An Empirical Examination of Adjudications at the National Labor Relations Board

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ABSTRACT

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Understanding empirically how administrative agencies work is crucial to designing an optimal political system. In this dissertation, I study the National Labor Relations Board's ("NLRB") administrative adjudication decisions during the Clinton and second Bush presidencies. In addition to gathering necessary information about how a particular agency actually works, I examine the impact that partisanship has in impacting case outcomes, and in particular how partisan panel effects affect case outcomes. I also look at how other political actors, such as the reviewing court of appeals, oversee agency decisions. Further, the study is one of the first to empirically look at how agencies go about the business of interpreting governing statutes. Such empirical information does much to inform our understandings about the role of partisanship in agency decisionmaking. Moreover, it informs our understanding of how multi-member adjudicative bodies make decisions as well as what should be the appropriate relationship between reviewing courts and administrative agencies.

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Dedication

This work is dedicated to the memory of my late grandmother, Nellie Posluszny whom I truly loved and admired throughout my life.

Chapter 1: An Empirical Examination of the National Labor Relation Board's Adjudications

Introduction

Federal administrative agencies handle a host of litigation disputes ranging from deciding Social Security benefits to adjudicating representation elections in labor disputes to deciding how to divide up veterans' benefits. Indeed, many, if not most Americans, will likely have some encounter in their lifetime with administrative adjudication. Agencies often make "rules" to decide the tasks Congress delves to them, but in other cases, they hear disputes case by case through adjudications. Despite the importance of administrative adjudications, scholars have paid scant attention to studying this activity, instead devoting more attention to understanding other actions of agencies, such as rulemaking (O'Connell 2008). While agencies publish year-end outputs displaying summary statistics of case outcomes, there is very little analysis on exactly how agencies as a whole actually do the very work that Congresses delegates to them. More specifically, we know very little on how individual agency actors, individually and collectively, actually make decisions for the agency. How do groups of agency decisionmakers – operating in panels – decide cases? How do they interpret statutes? How are those decisions in turn reviewed by the judicial body charged to oversee that the agency does not overstep its bounds? Only by looking at the empirics of an issue can we then make policy judgments on whether the agency is acting the way we would expect it to act in a democratic republic.

This dissertation seeks to fill that gap by looking empirically at the adjudicatory decisions of the National Labor Relations Board ("NLRB") as a case study during a 16 year period surrounding the Clinton and second Bush presidencies. No other adjudicatory agency has suffered more claims of political bias than the NLRB. Founded during the 1930s, New Dealers designed this agency to ensure the fairness of labor practices and to monitor representation

elections for unions. Since its founding, however, critics of the NLRB have claimed that the agency is unduly political and that its Board makes inconsistent legal rulings, switches precedent and overrules existing legal standards whenever enough Board members exist to form a new majority to overturn past rulings. The controversy over the NLRB has grown so intense in recent years such that the Obama Board ceased operating for over two years because new Board members could not be confirmed, with the showdown ultimately ending up in the Supreme Court. Claims concerning the Board's politicization are not new. Indeed, as will be discussed, widespread concern among industry on the Board's supposed pro-union rulings led to thousands of hours of congressional testimony and a drastic revamping of the Board so as to weaken its power, resulting in the Taft-Hartley Act of 1947.

Yet, despite claims by the media and scholars alike that the NLRB is too political for its own good, we know very little empirically on how the NLRB actually makes decisions. While there have been some scholars who analyzed NLRB decisions, much of the analysis is dated, as it primarily consists of studying cases prior to the ideological turn of the Reagan years. More recent analysis fails to account for the mechanism of case selection effects and litigant behavior. Moreover, as with most research dealing with the quantitative study of administrative agencies, no study considers the important legal differences between case types. Such analysis also makes no attempt to explain the mechanism of politicization and to explore how the agency's founders envisioned it operating. An agency only oversteps the bounds of its discretion if it acted in a way that its political principals disagreed with. Certain agencies may be designed in such a way so as to be able to make "political" judgments as substitutes for the actions of the agent's "principal," in this case Congress, the President and the courts. Thus, without an understanding of the institutional development of the agency structure, and how its founders envision it operate,

one cannot make judgments that an agency is too political or not political enough. Founders of an agency may design an agency with a particular goal in mind. They in turn design the agency with a specific structure so as to get certain outcomes. In this way, the agency structure serves as a way for the politician to exercise *ex ante* oversight.

In addition to studying the NLRB to see if claims of politicization hold up, it is also important to study the NLRB to understand how it decides cases as a legal matter. Due to taxing coding requirements, it is very hard to actually understand how any court – the NLRB or a federal court for that matter – actually interprets statutes. Does it merely defer to lower level decisionmakers? Does it take an active role in interpreting statutes? Moreover, as a percentage of the whole, how many times is the NLRB actually charged to interpret statutes in its decisions? This type of information would do much to enlighten us about actually how the NLRB makes decisions.

Finally, we also know little about what exactly happens after the NLRB makes a decision. Of course some parties settle or otherwise agree to the NLRB's edicts. What happens, however, to the small minority of cases that make their way to the federal courts of appeals? Indeed, what is the interaction like between the NLRB and the court of appeals? While there has been some study of the NLRB or federal courts of appeals reviewing NLRB cases in isolation, few have really looked at the issues together to see the interacting relationship between the agency and the federal court of appeals. Such an analysis would do much to enlighten our understanding of how the federal court of appeals review agency decisionmaking.

What Does It Mean to Be an "Independent" Agency?

Changing Expectations of "Independent Agencies"

At its very heart, an "independent" agency is one that should be – in some ways – insulated from partisan control, specifically, executive control (Breger and Edles 2000; Levinson & Pildes 2006; Verkuil 1988). As the United States Supreme Court said in the seminal case of *Humphrey's Ex'r v. United States*, independent agencies require insulation from politics because its workings "should not be open to suspicion of partisan direction."[1] Traditional metrics of agency independence emphasize certain design features that distinguish an independent agency from its counterpart, an executive one.[2] One of the hallmark features of an independent agency is that Presidents lack the power to be able to fire an agency's leaders (Gersen 2010; Bressman & Thompson 2010). As some scholars have noted, this removal restriction serves as one of the key features that differentiates an independent agency from an executive agency because this design choice isolates the agency from the President's plenary control (Bressman & Thompson 2010). Independent agencies often share other design features in common as well. Instead of being merely headed by a single administrator whose term expires on the eve of an executive's last day in office, most independent agencies consist of multi-member boards where members serve fixed terms staggered across presidential administrations. Some of these boards also have explicit partisan balancing restrictions so as to ensure non-biased decisionmaking.[3] All of these

[1] *Humphery's Ex'r v. United States*, 295 U.S. 602, 625 (1935).

[2] *But see* Bressman & Thompson (2010) for discussion of why such a binary distinction between independent and executive agencies may not be appropriate. Bressman et al. suggest there are many different hallmark characteristic of independent agencies, and as such, they suggest viewing agency structure as a continuum of sorts rather than as a binary distinction between executive and independent agency.

[3] For instance, no more than three of the five SEC Commissioners may be of the same political party. 15 U.S.C. §78d (2006a). Other independent agencies have similar restrictions. For instance, at the Federal Reserve, no more than one member may "be selected from any one Federal Reserve district;" the statute also notes that in selecting members, the President should be mindful to ensure there is a "fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." 12 U.S.C. §§241-242 (2006).

institutional design choices – for cause limits on removal, fixed statutory terms, statutory partisan restrictions, among others – serve the purpose of limiting presidential control of agencies (Strauss 1984; *see also* Mendelson 2003; Lewis 2003).

These design features promote the agency as an unbiased expert. During the New Deal period – the founding time period of many of the "independent" agencies – politicians believed that the nation's problems could be best solved if dispassioned experts decided cases. Political actors simply lacked the expertise and time to deal with many of the nation's pressing social and economic problems (Landis 1938). One Congressman said the following during debates over the formation of one of the first independent agencies, the Interstate Commerce Commission: "How much better this [creating an independent commission] is than to fix in advance by inflexible law the whole body of rules to govern the most complex business known to civilization."[4]

Yet, expertise alone is not the only reason political actors choose to delegate to independent agencies; rather, political calculations may play an important role in Congress' choice of agency forum (Devans & Lewis 2008).[5] As one scholar noted – and countless empirical studies have found – "there is …little rhyme or reason as to Congress' designation of a particular agency as either a cabinet agency or an independent regulatory commission" (Devans & Lewis 2008, 49; Fox 1999; Devans 1993). Scholars have found that Congress is more likely to create independent agencies during periods of divided government (Epstein & O'Halloran 1999).[6] Politicians might simply lack the political will to be able to make a decision of what is

[4] 17 Congressional Record 7290 (1886) (statement of Rep. Hitt) (debate on regulation of railroads).

[5] Indeed, many executive agencies deal with complex subject matters requiring agency expertise: the Food and Drug Administration, the Department of Justice (which enforces the antitrust laws), among others, all regulate issues that require agency expertise.

[6] Devans & Lewis note that Democratic Congresses during Republican presidencies attempt to limit presidential power over independent agencies through limits on the president's appointment and removal authority. By contrast, during periods of unified government, Democratic congresses were less likely to impose restrictions.

best for the country rather than what is best for their own electoral needs. That dispassioned experts would make decisions removes the taint of political decisionmaking and enhances policy stability; rather than policy changing with the onset of a new administration, regulatory policy instead would be relatively stable, subject to the whims of changing fact patterns rather than to changes in political actors (Barkow 2010; Bressman & Thompson 2009). This initial design of the Federal Reserve in 1913 best exemplifies this rationale. Concerned that presidents would manipulate monetary policy and banking regulations in line with their short-term interests, Congress designed the agency such that monetary policy decisions would be isolated in the Federal Reserve Board of Governors with a fixed ten to fourteen year term (Cushman 1972).[7]

Avoiding the specter of agency capture also motivates the choice to create an independent agency (Barkow 2010; Stewart 1975). Rachel Barkow discounts the reasoning that politicians create independent agencies primarily in order to insulate decisionmaking from the President; rather, she argues that politicians create independent agencies in order to avoid the appearance of agency capture. An insulated agency, she notes, can better "resist short-term partisan interests," and will put "more emphasis on empirical facts that will serve the public interests in the long term (17)." Congress made clear that avoiding agency capture motivated the creation of the Federal Reserve, for example.[8] Barkow contends that certain interests group can often gain favor over agency decisions because they are often "well-financed" and "well-organized," and they can also be in a position to lobby political actors to advance their agenda (22). Moreover, the "information advantage" that regulated entities have over their competitors

[7]As another example, the avoidance of "one-sided partisan control" served as a key motivating factor behind the choice of structure for the first independent agency, the ICC.

[8] H.R. Rep. No. 74-742, at 1, 6 (1935). The Banking Act of 1935, setting forth the structure of the Federal Reserve, was meant to help "the general public interest" as opposed to "special interests," such as a specific business lobby.

as well as the fact that agency officials often will return to private practice upon completion of government service (the so-called "revolving door" phenomena) further exacerbates the threat of agency capture.

Aiming to create an administrative state premised on expertise, Congress and the President created a host of so-called "independent" agencies prior to World War II. Although some "independent" agencies existed prior to the New Deal, the social and economic chaos of the 1930s served to highlight the necessity of having unbiased experts decide policy above the fray of short-term political interests. Congress and the president debated the design choices for many of the agencies. For instance, the original draft of the bill for the formation of the Securities and Exchange Commission placed the agency within the Post Office, which was a cabinet department at the time; moreover, Frances Perkins, Secretary of Labor, lobbied endlessly to position the NLRB within the confines of the Department of Labor (Gross 1981, 1995). President Roosevelt made an effort to stem the tide of creating so many independent agencies by commissioning the Brownlow Committee to study the changes being made to agencies (Fisher 1998). Although the Committee cautioned that the President lacked the ability to control an agency unless cabinet officers supervised it, its recommendations failed to gain any traction. Further, once the Supreme Court solidified the constitutional footing of many of these new independent agencies (Rabini 1986),[9] the stage was set for these agencies to take hold. After WWII, both the Supreme Court and mounting social and economic issues contributed to the rise of even more independent agencies. By the 1970s, Congress had created a host of new independent agencies, heralding what some have called the "public interest era" (Sunstein 1990). Examples include the Federal Energy Regulatory Commission to regulate expanding use of

[9] For instance, the Court upheld the constitutionality of the NLRB. *See NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 49 (1937).

energy, the Nuclear Regulatory Commission to handle disputes dealing with the ever-growing use of nuclear power, and the Occupational Safety and Health Review Commission, among other independent agencies, to decide matters on workplace safety.

Yet, by the 1980s, increased partisan polarization as well as policies Ronald Reagan pursued in pursuit of the "unitary executive" contributed to a change in the ways presidents controlled independent agencies. Changes in the demographics of both political parties contributed to the parties becoming more homogenous internally and more heterogeneous from each other, leading to increased polarization between the parties (Roberts & Smith 2003).[10] Alongside this trend, President Reagan sought to centralize executive control of the bureaucracy through new policies dealing with regulatory review and signing statements (Devans & Lewis 2008). He first took action to centralize agency control by issuing an executive order to bring executive agencies more firmly under his control. In another move, Reagan manipulated the appointments process to ensure that appointments to agencies embraced his deregulatory, conservative philosophy. Reagan saw ideological loyalty as the hallmark of presidential appointments, and as such routinely vetted nominees for their ideological consistency and intensity. Rather than focus on subject-matter expertise, Reagan wanted his appointees "to see themselves as part of a unitary administration and not as a manager of some discrete agency" (Devins & Lewis 2008, 481).

Later presidents embraced many of these Reagan-era changes to further centralize executive control over independent agencies. As one scholar put it, the features of presidential oversight first put in place by Reagan have "become a permanent part of the institutional design of American government" (Hahn & Sunstein 2002, 1506; Sherwin 2006; Pildes & Sunstein

[10] Most notably, the civil rights revolution spurred conservative Southern democrats to bolt for the Republican party.

1995). President Clinton even amended President Reagan's Executive Order so as to bring within its ambit independent agencies in a limited way, though President Bush did away with this change. Moreover, not only did future presidents strengthen Reagan's executive orders, but they took other action to ensure that executive agencies at least followed presidential directives (Kagan 2001). Ideology too continued to serve as a litmus test for agency appointment. By the 1980s, "independent" agencies appeared to have strayed very much from what New Dealers envisioned them to be. The question remains: how do "independent" agencies act in practice and is this consistent with our expectations of how we think independent agencies should behave? We turn now to look at how that issue has been discussed in the political science and legal literature.

The Study of Independent Agencies Today

Political scientists and legal scholars have spilled much ink studying the ins and outs of "independent agencies." They do so, however, from different perspectives, and there has not been much cross-fertilization of ideas between the two camps. Indeed, the names employed to study the fields underscores the different perspectives. In political science, the study of administrative agencies is considered the study of "bureaucratic politics" while in the legal sphere, studies of administrative agencies fall under the ambit of "administrative law." The nomenclature is telling; political scientists look at the issue through the lens of politics, trying to assess how the agency fits in within the global institutional framework of American politics. A graduate level course in "bureaucratic politics," for instance, would focus on the "congressional dominance" literature studying how Congress "controls" the outcomes of administrative agencies (Moe 1985; Weingast and Moran 1984). Legal scholars, on the other hand, look at the study of agencies in a more nuanced fashion by looking at it through the perspective of having its own

unique legal rules. A course in "Administrative Law" in law school – often a *de facto* requirement for second or third year law students – focuses heavily on standards of review for federal court review of agency decisions or the legal rules by which agencies must operate under to do notice and comment rulemaking. There would be virtually no overlap in scholarly material discussed between the two courses.

Political Science Perspective on Bureaucratic Politics

Drawing from the rich literature that has been done in political science concerning congressional and bureaucratic "control," political scientists generally study bureaucratic politics quantitatively by assessing statistical measures of how well so-called political "principals" monitor the "agents" (the agencies) that they are charged to monitor. Employing the language of the "principal-agent" framework, these scholars underscore that multiple and competing principal-agent relationships exist among the agency's principals (Congress, President and courts) as well as within the bureaucracy itself (Moe 1987; McNollgast 1987). Scholars testing these theories largely limit themselves to the study of a single agency and often flesh out their argument using regressions done on a countable measure of performance (such as number of investigations or the size of the budget) in order to make claims on how political actors influence a certain type of agency behavior (Weingast and Moran 1983; Wood 1990; Wood and Waterman 1991, 1993; Wood and Anderson 1993; Balla 1998). Political scientists also often borrow from the rich judicial politics literature to show how ideological attitudes of decisionmakers motivate outcomes (Segal & Spaeth 2002; Moe 1985).

Political scientists expressly consider how the wishes of other political branches impact agency decisionmaking. In their seminal article, Weingast and Moran (1983) examine the behavior of the Federal Trade Commission ("FTC") to assess the extent to which Congress

"dominates" decisionmaking at the Commission. Building on a model of legislative choice, the authors show how the FTC initiated controversial policies in line with receiving signals from the congressional oversight committee. They conclude that the FTC's activity (or lack of activity) is "remarkably sensitive" to changes in the composition of congressional oversight committees (793), thus underscoring the importance that so-called political principals have in motivating agency outcomes and in ensuring that agencies exercise their discretion in line with the wishes of political principals in the other branches of government. Others building on the work of Weingast and Moran explain more about the mechanics of political control, emphasizing the role that *ex ante* and *ex post* controls by Congress can have on agency outcomes (McCubbins & Schwartz 1984).

Political scientists do a good job of explaining some of the empirics of agency decisionmaking, though even in that respect scholars have devoted most of the focus to specific areas. Much of the empirical literature delves into explaining how agencies make rules rather than in how they do adjudications of legal disputes. Moreover, political science literature generally focuses on a specific agency during a limited time frame, a phenomena that somewhat limits the applicability of any given study. Political scientists put greater emphasis on opining on how judicial ideology impacts cases outcomes as well as on how judges respond more directly to political principals (Segal & Spaeth 2002; *see also* Ruger et al. 2004).

Moreover, political scientists all but ignore the normative implications of their findings; indeed, most papers set forth the issue theoretically, discuss the variables of the study, set forth a regression and then briefly discuss the findings. How these findings fit into understanding agency behavior – and more importantly using such findings to make policy judgments on how agency behavior can be improved or changed – is often something neglected by political

scientists. As Judge Edwards and Michael Livermore (2009) point out, such an analysis ignores some of the most vital parts of lawmaking, namely political scientists make no consideration of case records, applicable law, precedent and judicial deliberation. They essentially treat all cases and situations alike by failing to recognize and explain how legal problems can differ in significant ways to explain outcomes. They look at court behavior from a top-down perspective, focusing on how principals can "induce" lower courts to follow mandates (Friedman 2005, 296).

Legal Understanding of the Administrative State

Legal scholars, on the other hand, look at the issue differently, from a more normative and policy-based perspective (Friedman 2005). Many a law review article debate the normative implications of the "unitary executive," for instance. Legal scholars do an excellent job of describing the ideal prototype for how a given agency – or the administrative state in general – *should work*. Legal scholars devote attention to explaining how agencies could be improved or how they may not be fulfilling their mission. All too often, however, legal scholars make such judgements without having any empirical leg to stand their reasoning on. Although in recent years, the advent and rise of the Empirical Legal Studies ("ELS") movement in legal scholarship has done much to provide a stronger empirical backing for normative claims made by legal scholars, it is still the case, however, that much of legal scholarship rests on explaining theoretical and normative understandings of agencies. Moreover, the limited empirical work done on the administrative state has largely concerned understanding how agencies conduct rulemaking (O'Connell 2008). Understanding empirically how agencies undertake adjudications is something that has largely been neglected by the legal literature, partly because coding cases for legal issues is a laborious task, with data being expensive to collect or difficult to gather. Moreover, even if one can obtain data, there are often hard choices to be made in deciding how

to "code" for legal doctrine. Further, while legal studies have done much to opine on how agencies should be designed, few empirically look at outcomes to buttress their claims.

Application of this Dissertation

Both disciplines have much to offer to provide insight into how agencies actually work in practice and in more recent years, there have been more serious attempts to try to offer the best of both perspectives, as this dissertation seeks to do (Friedman 2005). We need to understand how agencies actually work in practice – in adjudications, not just in rulemaking – in order to provide better context for the normative and policy judgments we make about the administrative state. Moreover, we need to do more to actually apply what we find in statistical analysis to inform our understanding of both behavior in a given administrative agency as well as behavior in the administrative state generally. We can also do much to cross-apply what we learn in other political science disciplines. For instance, the rich judicial politics literature can inform our understanding of the administrative state since the general actors – litigant and judge – are largely the same in many important ways.

This dissertation will contribute to the debate being undertaken by other legal scholars and political scientists who seek to test long-standing theories of the administrative state with the quantitative methods of social science. This work also will enhance the often weak connection there is between legal scholars and political scientists; while there are some scholars who bridge the gap between the fields, there is still much each side can learn from the other. Moreover, this work will apply theories and techniques previously used in the study of federal courts to study administrative adjudication. For instance, there is a vast and developing literature in both judicial politics and the legal literature studying the impact that ideology and panel composition play in impacting vote choice. However, such work has largely been limited to the study of the

Supreme Court, and more recently, in a welcome development, to the study of the work of the federal courts of appeals and district court (Ho 2009; Sunstein et al. 2006). Applying these theories and techniques to the study of the vast administrative state will only serve to help us better understand the factors that impact adjudicatory decisions in matters that affect millions of Americans everyday. Finally, this work is one of the first to empirically take on the issue of statutory interpretation. While a rich literature exists in the law reviews on theories of statutory interpretation and there has been some recent headway in understanding empirically the factors that go into decisionmakers' minds, there has not yet been a study that examined statutory interpretation from the agencies' perspective, as this study seeks to do, if only as a beginning study.

Outline of the Project

This dissertation attempts to look at the NLRB's adjudicatory decisionmaking process holistically in both a qualitative historical and quantitative fashion. In Chapter 2, I lay out the institutional development of the structure of the NLRB so as to elucidate what its founders intended the agency to be. The NLRB is unique among federal agencies, as it is one of the few that has a bifurcated structure with adjudicatory power equally shared between the Board itself and a presidentially appointed General Counsel. Congress made this change in the Taft-Hartley Act after congressional hearings in the early 1940s criticized the Board for its supposed pro-union bent during the late New Deal era. I argue that the history of the NLRB indicates that its founders wanted to ensure that the agency was apolitical and that it acted like a court, a "labor court," where claims could be quickly and consistently adjudicated. Using the legislative history and the James Gross NLRB agency archives located at Cornell University, I make a qualitative argument that the agency's founders envisioned the agency to be one where politicization (if at

all) would only creep in through presidential appointments of the General Counsel or Board; Congress and the judiciary largely were intended to stay out of the Board's business.

After laying out what the NLRB's founders envisioned for the agency, in Chapters 3-7, I empirically examine the NLRB of recent years to see whether it serves as the type of impartial decision-maker envisioned by its New Deal founders. The NLRB changed in the 1980s, when Ronald Reagan began appointing more ideological appointees to the Board, a pattern that recent presidents have followed. I created a dataset of over 2,700 NLRB decisions from the Clinton and Bush years to test how political actors like the Congress, the President and the courts impact agency action. Similar to what others have found, the NLRB is largely constrained in the freedom it has to make decisions as it can only decide issues brought to it. It has limited discretion to overturn certain findings, such as credibility findings, of the lower court administrative law judge ("ALJ"). ALJs are "subject to the published rules of the agency and within its powers."[11] While the NLRB may make some high profile case rulings, it decides the vast majority of the 800 or so contested unfair labor disputes cases every year in a fairly evenhanded matter, usually finding in favor of labor. Not surprisingly, appointees from management vote more often than union appointees for industry; but even there, management appointees vote more than 80% in line with labor, a percentage that has stayed consistent over the years. To the extent there is any political voting, Republican members tend to do that more than Democratic members.

In Chapters 3, 4, 5 and 6, I specifically examine empirically Board decisionmaking. In Chapter 3, I describe the raw summary data. Few scholars have systematically examined

[11] ALJs are career appointees hired under the Office of Personnel Management; they can only be suspended for cause and determinations of pay, promotions/demotions and workplace ratings are determined by OPM and not the agency itself (Taratoot 2013).

summary caselaw data of any adjudicatory agency let alone the NLRB. While the NLRB produces annual reports giving summary information, such information is of little import because there is no systematic examination of patterns to decisionmaking. My own coding of caselaw, supplemented by information I obtained from the NLRB through Freedom of Information Act requests, enabled me to provide the first summary analysis of how the NLRB decides cases from a legal perspective for the period under study.

In Chapter 4, I examine whether so-called "partisan panel effects" impact Board decisionmaking. In studying the federal circuit courts of appeals, scholars have found that results of cases vary depending upon the partisan composition of the particular panel hearing a case (Sunstein et al. 2006; Farhang & Wawro 2004; Revesz 1997). However, to date, few have systematically studied whether partisan panel effects occur in administrative adjudication. While in many respects administrative adjudication resembles judicial activity, in some respects, it can be very different. For instance, the principle of *stare decisis* is not as widely applied in administrative adjudication, meaning that administrative agencies do not necessarily feel as bound by precedent made by other panels of the Board. In this chapter, I explore the role that partisan ideology and panel composition have in impacting the vote choices of one of the administrative agencies rumored to be one of the most partisan– the National Labor Relations Board. Employing an original dataset of NLRB decisions from the Clinton and Bush years (1993-2007), this analysis presents one of the few recent studies of voting patterns at the NLRB on unfair labor practice disputes. I find that the propensity of a panel reaching a decision that favors labor increases monotonically with each additional Democrat added to the panel during much of the time frames under study. I also find that the partisanship effect is unbalanced, meaning that the addition of a single Democrat to an otherwise Republican panel increases the

propensity to vote in labor's favor more so than the addition of a Republican to an otherwise Democratic panel. Homogenous Republican panels – increasingly prevalent in recent years – behave in especially partisan ways. I further find that political actors – such as the Congress, the President and the appellate courts – fail to have a direct impact on NLRB unfair labor practice decisions; rather, the decision of the lower court ALJ and the partisan ideology of the Board have the most impact in influencing whether the NLRB rules for or against labor. These findings have significant implications for a number of controversies, including debates about agency independence as well as questions concerning political diversity on multi-member adjudicatory bodies. Significantly, however, while I do find some evidence of panel effects, it is still the case that legal factors – namely the ALJ decision as well as the specific statutory section being challenged – also proved to be significant in predicting how the Board will ultimately rule.

In Chapter 5, I look at another aspect of NLRB action, this time moving to an analysis of how the upper level regional appellate court decides NLRB cases. After the NLRB hears a case, the losing party can then appeal the case to the appropriate regional court of appeals or the United States Court of Appeals for the District of Columbia. Likewise, because Board orders are not self-enforcing, the NLRB itself will often appeal to the federal courts in order to have an order enforced. In this chapter, I focus on analyzing what political and economic factors motivate a federal court of appeals court to decide to enforce or not enforce a Board order, focusing specifically on examining partisan panel effects. Like the NLRB, I find evidence of panel effects on appellate court reviewing bodies. In particular, homogenous Republican panels rule differently than mixed partisan bodies. If appellate courts abide by the deference of the agency, why would we even see panel effects?

Finally, in Chapter 6, I look very briefly at the legal issue of statutory construction. In recent years, legal scholars have called for greater quantitative study of how statutes are construed and what statutory methodologies courts apply to their understanding of statutes (Mashaw 2013). Law review articles in the past few years have begun discussing the empirics behind statutory interpretation, yet no one to date has really empirically examined how agencies actually interpret statutes. In this chapter, I attempt the challenge, looking empirically at what statutory methodologies the Board uses in making decisions in litigated unfair labor disputes from 1993-2007. Although the database is small and as such, my analysis must be somewhat limited, I find that the Board uses a vast array of methods, with the Board relying primarily on looking at the statute's purpose and legislative history to inform its understanding of how labor relations should go forth. The analysis in Chapter 6 is just a first glimpse on how the NLRB interprets statutes and it is something that I hope to expand to in future work.

Lastly, in Chapter 7, I return to looking at the organizational structure of the NLRB to propose suggestions for reform. Harkening back to Chapter 2 where I discuss the NLRB's history, I discuss how the NLRB has evolved since its redesign in the wake of Taft-Hartley Act. Given the empirical information I gleaned during the course of this dissertation, I propose some thoughts for reform of the NLRB. Specifically, I argue that the Board perhaps could be seen as a more legitimate body if it mandated partisan panel diversity and if it relied more on rulemaking to set forth clearer standards in which to base adjudications. Moreover, I contend that there needs to be a better working relationship between the Board and the appellate courts. If the Board is indeed an expert policymaking body, appellate courts should defer more to the expertise of the Board and not try to relitigate fact-finding. Moreover, I also argue that perhaps the time is near to debate whether a specialized appellate court should oversee Board decisionmaking.

Applicability to Understanding Administrative Agencies Generally

This dissertation is but one analysis of a single administrative agency across a limited range of years. However, although its focus is necessarily limited, the empirics undercovered here contribute much to the understanding of how administrative agencies operate. Congress and the executive designed administrative agencies with a vast array of structures; some allow direct rights of action for litigants; others have prosecutory authority housed in the agency itself while still others depend on the Department of Justice to mount claims on its behalf. Agencies also differ much with respect to their composition; some have multimember boards while some operate in a more unitary capacity. Some agencies depend more on adjudication than others. As such, because there are so many differences between agencies, it makes it challenging to make generalizations. However, unless we start looking at administrative agencies empirically, we will not know if they are, in effect, operating according to the ideal we set for them. This dissertation is a first step in looking at how one administrative agency operates, and what I conclude here can hopefully serve as a fruitful beginning to look at other administrative agencies the same way in order to make comparative statements about how agencies act and what the ideal structure may be to foster the twin aims of expertness and democratic accountability.

Chapter 2: NLRB: Structure and History

No other adjudicatory agency has probably suffered more claims of political bias than the NLRB. Founded during the 1930s, New Dealers designed this agency to ensure the fairness of labor practices and to monitor representation elections for unions. Yet, since its founding, critics of the NLRB have claimed that the agency is unduly political and that its Board makes inconsistent legal rulings, switches precedent and overrules existing legal standards whenever enough Board members exist to form a new majority to overturn past rulings. The controversy over the NLRB has grown so intense in recent years such that the Obama Board ceased operating for over two years because new Board members could not be confirmed. Claims concerning the Board's politicization are not new. Indeed, as will be discussed, widespread concern among industry on the Board's supposed pro-union rulings led to thousands of hours of congressional testimony and a drastic revamping of the Board so as to weaken its power, resulting in the Taft-Hartley Act of 1947.

In this chapter, I lay out the institutional development of the structure of the NLRB so as to elucidate what its founders intended the agency to be in order to provide insight to understand the rest of the dissertation. The NLRB is unique among federal agencies, as it is one of the few that has a bifurcated structure with adjudicatory power equally shared between the Board itself and a presidentially appointed General Counsel. Congress made this change in the Taft-Hartley Act after widespread hearings in the early 1940s concerning the supposed pro-union bent of the Board. It deliberately separated power out between the General Counsel and the Board in response to complaints that the Board was too pro-union. I argue that the history of the NLRB indicates that its founders wanted to ensure that the agency was apolitical and that it acted like a court, a "labor court," where claims could be quickly and consistently adjudicated. I make a

qualitative argument that the agency's founders envisioned the agency to be one where politicization (if at all) would only creep in through presidential appointments of the General Counsel or Board; Congress and the judiciary largely stayed out of the Board's business. Yet, the structure of the Board with two competing heads – and appointments being staggered across presidential administrations – mitigated even this type of politicization. The more judicial tone of Board decisions was also reinforced by the president's appointment practices; prior to 1980, presidents generally appointed members from academia or government to the Board. Moreover, the fact that presidents routinely reappointed a member of the opposing party to fill a vacant seat, a practice that continues to this day, likely tempered any politicalization. After laying out what the NLRB's founders envisioned for the agency in this chapter, in the next chapter Chapter 3, I empirically examine the NLRB today to see whether claims of politicization hold fast under scrutiny and to see whether the NLRB of today holds to the vision of its founders of being an impartial agency.

Founding of the NLRB

The NLRB went through several key internal changes in its first twelve years of existence. As indicated in his history, NLRB's founders designed it to be a "labor court," and they deliberately created it as independent from other entities. As originally conceived in 1933, the NLRB's predecessor, the tripartite National Labor Board ("NLB"), formed in 1933, was considered to be an informal entity that would settle strikes though mediation, informal discussion and voluntary cooperation.[12] The Board's increasing workload forced it to add more members. By October 1933, regional boards in 12 cities – serving as "mini" versions of the

[12] To recount this history, I rely extensively on James Gross' (1974, 1981, 1995) excellent three books as well as his internal records located at Cornell University. Through a grant from the Columbia political science department, I was able to spend two days at Cornell looking at Professor Gross's records that he used to write his books. Most of the material consisted of original NLRB source documentation.

national board – were established to help (Gross 1974, 1985, 1995).[13] But many viewed these local boards as too employer-focused (Gross 1981). Indeed, labor became so disenchanted by the actions of these local boards, resulting in the NLB and the Department of Labor soon began receiving hundreds of letters of protest. Jurisdictional turf wars with other agencies prompted the decentralization of the NLB as a means to resolve the dispute.

The NLB's position as a voluntary body focused on mediation impacted the way it functioned and effectively prevented it from being able to accomplish its objectives (Gross 1981). Although regional boards had autonomy to make decisions, the central NLB had the right to review the decisions of the regional boards. The NLB also required the regional boards to submit "questions of law" to the national office. Complicating the problem, the NLB also lacked power to enforce its own decisions; rather the power of enforcement was relegated to the Compliance Division of the NRA (which later lost this power) and the U.S. Department of Justice, who had to proceed *de novo* to enforce decisions made by the Board. The President made attempts to increase the powers of the NLB through the issuance of various executive orders, but they were to no avail.

The experience of the NLB taught labor advocates that a stronger, independent board was needed (Gross 1981). After numerous failed attempts in 1934 to change the Board, threats of a general steel strike compelled President Roosevelt to try to resolve the matter quickly. Public Resolution 44, passed June 16, 1934, provided the bare-bones authority for the President to establish a "board or boards to investigate labor disputes and to conduct representation

[13] Practicalities alone did not dictate regionalism of the Board per se; political factors too helped to cement the initial structure of the NLB as largely making decisions on a regional basis. The National Recovery Administration, headed by General Hugh Johnson, established local NRA compliance boards – even prior to the formation of the NLB - as a means to cement NRA jurisdiction over local labor law.

elections." As with the NLR, the Board lacked enforcement powers, having to rely instead on DOJ to enforce its decisions. Yet, the new Board heralded somewhat an improvement over its predecessor. Pursuant to Public Resolution 44, by Executive Order 6763, President Roosevelt set forth in motion the National Labor Relations Board, charged to investigate, hold hearings and make findings of fact on labor disputes. The newly formed Board had the power to conduct representation elections, which an employer could have reviewed in the circuit court of appeals. In a sense, the newly formed Board was more independent than its predecessor the NLB, as its jurisdiction was exclusive and its findings of fact nonreviewable by the courts. In contrast to the NLR, whose composition was more partisan and whose staff was part-time, the President appointed three full-time paid impartial representatives to the NLRB. Although Senator Wagner's original bill envisioned the Board as having representatives from industry and labor, "a consensus [emerged] that only the public should be represented,"[14] and the final bill put on the Board "three impartial Government members."[15] Yet, despite these changes, the agency was still not yet wholly independent. The executive order created the NLRB "in connection with" the Department of Labor, something that Secretary of Labor Francis Perkins desired (indeed, she went even further as she wanted the NLRB actually inside the DOL). Perkins later used this authority to ensure that the Board consulted with the DOL on major appointments and to work with Labor on budget issues.

[14]A Bill to Promote Equality of Bargaining Power Between Employers and Employers, to Diminish the Causes of Labor Disputes, to Create a Labor Board, and for Other Purposes, Hearings on S. 1958 Before the Senate Comm. On Educ. and Labor, 74th Cong. 291 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act of 1935, at 1617, 1677 (commemorative report, reprint 1985).

[15] Staff of Senate Comm. On Educ. And Labor, 74th Cong., Comparison of S.2926 (73d Cong.) with S.1958 (74th Cong.), Section 3 (Comm. Print 1935), reprinted in J. Leg. Hist. of the NLRA, at 1319, 1320 ("Legislative History of NLRA").

The Board's first three members – Lloyd Garrison, Edwin Smith and Harry Millis – immediately set to work to make the Board more of a judicial body than its predecessor the NLB had been. They relegated representation elections and mediation to the regional boards. A Legal Division at the national NLRB was set up composed of seven members to assist with cases and to help DOJ with compliance issues. In addition to promulgating rules to encourage more uniformity, the Board also sought to improve the quality of the records at the regional level so that the NLRB could better rely on records without having to rehear cases. They also changed the regional nature of the system by converting from 20 regional boards to 17 geographic districts with a regional labor board in each district (Gross 1981). Each district would be headed by a director who would supervise the hearings of the three-person panel composed of representatives from industry, labor and the public.

Numerous forces worked to halt the achievements of the newly invigorated Board. The decisions of the Board soon brought the ire of industry. Several pro-labor decisions in 1934 resulted in industry clamoring against the Board's authority. Employers also sought to tie up and prolong election representation cases by appealing the Board's decisions to the circuit court of appeals (Wheeler 1935). Industry opposition was not the only problem facing the new Board. Clashes with the President and the NRA weakened the Board's power. Secretary of Labor Frances Perkins continued to try to force the NLRB to come under her direct line of authority. Further, the Board lacked any power to enforce its own decisions. A 1935 NLRB report indicated that compliance had only been obtained in 46 of 158 cases.[16] DOJ also refused – mainly because of evidence issues – to take enforcement cases to court. Indeed, DOJ took only 1

[16] "Report to the President by the National Labor Relations Board for the Period from July 9, 1934 to August 27, 1935, Inclusive," August 1935 (James Gross Archives, Cornell University) (hereinafter "Gross Archives").

out of 33 noncompliance cases to court (Gross 1981). All of these things contributed to the NLRB's lack of effectiveness.

Changes to the NLRB by the Wagner Act

By 1935, however, Senator Robert Wagner – along with considerable input from the NLRB itself – sought to remedy these issues through enactment of the Wagner Act. In addition to setting forth labor policy, the Wagner Act clarified that the NLRB would be an independent agency in the executive branch. The Act also provided the NLRB with full authority over its regional system of administration. Although the rules of evidence would not control in NLRB hearings, the Board allowed itself to be subject to judicial review.

The Wagner Act set forth in place internal mechanisms to prevent past problems (Gross 1981). The Wagner Act stripped DOJ of its enforcement power by providing for review and enforcement of NLRB orders in the circuit court of appeals. Unlike its predecessors, however, the Board under the Wagner Act did not give litigants the power to appeal to the circuit courts for election orders precisely because allowing entities to do had brought about endless litigation in the past. Rather, only an election decision relative to an unfair labor practice could be subject to circuit court review. The Act gave more power to NLRB decisions. Whereas, before DOJ had to proceed *de novo* in compliance proceedings, the new law deemed NLRB findings of fact conclusive. The degree of judicial control given to the Wagner Act Board was no accident. Just three years prior, Congress had passed the Norris-LaGuardia Act which had stripped federal courts of jurisdiction over the enforcement of so-called "yellow dog contracts" – an agreement where the employee agrees as a condition of employment not to be a member of a labor union – in granting injunctions in federal court. Norris-LaGuardia served as an example of showing how the government distrusted the federal courts due to the courts' "long and sorry history of dealing

with labor problems" (Modjeska 1988, 403). Indeed, as one scholar put it, "The creation of the Board . . . may fairly be viewed as the result of congressional dissatisfaction with judicial lawmaking in the area of labor law" (Winter 1968, 53). Congress wanted labor policy to be made by an independent Board largely free from judicial second-guessing. Further, despite protestations to the contrary, especially that of Secretary of Labor Frances Perkins, the new Board was largely free of executive influence as well as it was not housed in the Department of Labor as Perkins wanted. As will be discussed, these changes were by design.

The Wagner Act's – and the Board's – very existence prompted the Board to centralize and to shift focus to ensuring the constitutionality of the Wagner Act. A Board Secretary (a foreshadowing of the later role of General Counsel established in Taft-Hartley) had primary authority to decide when to issue complaints in unfair labor and representation cases. The NLRB also set forth detailed procedures regarding how to decide cases so as "to give the Washington office very substantial control so that it would be able to formulate the litigation strategy" necessary to successfully challenge the Act's constitutionality.[17] Regional staff were also subject to greater monitoring and budgetary control by the center.[18] Pursuant to that policy, regional boards had to ask for centralized approval before proceeding with a case or for mediation.[19] Regional attorneys sent by Washington also advised regional directors on cases and assisted with preparing legal documents. Washington even sent some of the centralized staff into the regional districts to "teach …the ropes" and to figure out the "best [cases] into litigation quickly to decide

[17] Oral history interview with T.I. Emerson, pg. 51, cited in Gross 1974, 178.

[18] "Instructions to Staff Members," NLRB, September 17, 1935 (Gross Archives), cited in Gross 1981.

[19] U.S. Congress, *Hearings Before the House Special Committee to Investigate the National Labor Relations Board*, 76th Cong., 2d Sess, (Washington D.C.: GPO 1940) (hereinafter "Smith Committee Hearings"), vol. 24, part II, p. 5541-42.

the constitutional issues…"[20] In particular, the NLRB felt that the best cases were those that clearly involved interstate commerce and that had egregious labor violations (Gross 1981).[21] The NLRB also set up new machinery. Whereas before the regional directors had responsibility for ensuring that the cases had detailed records, after the Wagner Act, the new NLRB created another entity called the Trial Examiners Division – a division separate from the Legal Division that prepared the cases and served under the control of a Chief Trial Examiner.[22] NLRB cases from the Washington office would serve as binding precedent to guide the Trial Examiners' decisions. The Board also formed within the agency itself a Division of Economic Research, composed of economists and political scientists to gather economic evidence to use in Board cases and to come up with economic studies to inform Board policy.

Nevertheless, the Board itself still faced a host of problems. Industry was so opposed to the NLRB and the Wagner Act that they continually sought injunctions to prevent the NLRB from doing its work (Gross 1981). Indeed, in 1935-1936, industry filed over 1,600 injunction suits to halt NLRB proceedings, a process that the NLRB's First Annual report called a "rolling snowball" due to the increasing uniformity and prevalence of such suits.[23] Industry continually criticized the Board's rulings (Gross 1981). By May 1938, a *NYT* editorial by a prominent lawyer lambasted the NLRB for its fusion of judicial and administrative functions. The editorial joined forces with those clamoring for a separation of functions by proposing that federal district courts, instead of the NLRB itself, decide whether violations occur. The Supreme Court's

[20] Oral history interview with T. I. Emerson, pg. 56-59, as cited in Gross 1974,162 (Gross Archives).

[21] NLRB Third Annual Report p. 46 (Gross Archives).

[22] "Instructions to Trial Examiners," pg. 22 (Gross Archives).

[23] NLRB First Annual Report, p. 47 (Gross Archives).

eventual upholding of the Wagner Act brought no relief; "victory celebrations were brief at the board in April 1937" as the opposition changed its focus from the act to attacking the Board itself (Gross 1974, 232).

Big industry was not the NLRB's only opponent; indeed, Republicans and Southern Democrats heavily criticized the Board. Senator Edward Burke, of Nebraska, lambasted the Board in a nationwide radio attack in 1938 and later introduced Senate Resolution 207 saying that the NLRB failed to proceed "in the impartial manner required of a body exercising judicial or quasi-judicial powers" and that the Board favored certain unions (Gross 1981). Senator Burke later introduced another measure in 1939 that was even more drastic (S. 1264). This measure would have allowed a party to remove an unfair labor charge to federal court in order to avoid dealing with the NLRB entirely. There were also unsuccessful measures to try to discipline the Board through the appropriations process, with the Board's distractors calling the Board a "partisan, prejudiced, perfidious, persecuting, penalizing, putrid institution…" during debates on a bill that would have cut the Board's appropriation request by $400,000 from the amount given the prior year.[24] By March 1939, Congressman in the House and Senate had already introduced 11 bills to amend the Wagner Act.

It was also not just Congress that criticized the new Board –surprisingly, certain aspects of the labor movement also lambasted the Board. The acrimony underlying the relationship between the two leading unions – the AFL and the CIO – boiled over to debate concerning the Board itself as both entities charged that the Board favored its opponent (Gross 1981). The AFL was particularly hostile to the Board, in particular because of the Board's decisions determining the correct unit for collective bargaining, as the AFL favored designations along the lines of craft

[24] 83 Cong. Record 330, 331-34, 337-38, 732-34, 2357 (Jan. 11, 1938).

rather than industry. By 1938, at its annual convention in Houston, the AFL Executive Committee embraced a nine point plan for amendments to the Wagner Act, as well as two controversial amendments to alter the structure of the Board. These two amendments would give appellate courts jurisdiction to review NLRB findings of fact and would have also created an independent tribunal separate from the Board.[25] The AFL also levied its political influence to prevent Donald Wakefield Smith from being reappointed to the Board. In 1939, the AFL supported other measures that would have altered the Board's structures. For instance, one AFL-backed proposal would have imposed time limits on Board decisions, because there was a perception that the NLRB's delay in processing cases helped the CIO as it gave the CIO more time to organize.[26] The AFL also sought to shift power to the courts by proposing that the Board's finding of fact only be conclusive if supported by "substantial and credible evidence." Such changes foreshadow some of the later changes made by the Taft-Hartley Act.

Faced with the mounting criticism – and with a new more pro-industry Board member William Leiserson now on the Board – by mid-1939 the Board took measures to take the heat off of it (Gross 1981). In the wake of weeks of committee hearings to amend the Wagner Act in 1939, the NLRB agreed to make some changes, such as to allow employers to petition for a representation election and to lengthen the time between issuance of a complaint and the hearing, among others, in order to head off further congressional action. There was also a small –but noticeable – change in the tenor of Board decisions. The NLRB also took steps to address its critics in order hopefully to forestall the renewed calls for a congressional investigation of the NLRB. In 1939, Board Secretary Nathan Witt and former Board Secretary Benedict Wolff

[25] Proceedings of the AFL's 58th Convention, 1938, 344-345 (Gross Archives).

[26] Senate Hearings on Bills to Amend the Wagner Act, Part 6, pg. 1121-22 (Gross Archives).

attempted to rally pro-NLRB forces nationwide in order to prevent the Wagner Act from being amended (Gross 1981, 80).

Smith Hearings

Nonetheless, the Board's modest attempts to appease its critics were to no avail. Tension and disappointment over the Board came to a head in 1940 when the House decided to open a "special investigation" of the NLRB – the so-called "Smith" hearings, chaired by Representative Smith of Virginia. During these hearings, labor foes used internal dissention within the NLRB itself as a weapon against it. In particular, Congress heard detailed testimony concerning the power struggle ongoing between new Board member Leiserson and Board Secretary Nat Witt. At the time, the NLRB was structured as such that the Board Secretary – Witt – had a sole power to decide which cases to pursue and among other duties, he also assigned lawyers to cases and supervised the regional offices. Leiserson went to Congress to testify and charged Witt with incompetence and lack of impartiality in delaying certain cases in order to favor leftist unions. For months, tension between the two played out internally within the NLRB itself as Leiserson tried to get certain regional directors to oust Witt. In addition to charging Witt with influencing Board member Smith, Leiserson also charged Witt with exercising too much centralized authority over the regions, thus interfering with the autonomy of the regional directors.[27] Although Leiserson was unsuccessful in his internal structure to oust Witt, a Regional Directors Subcommittee found in 1939 that there was too much power in the Secretary's office and that there needed to be a fundamental reorganization of the office so that the Board could spend more

[27] Smith Committee Hearings, vol. V, pg. 1012.

time on its judicial functions – all points brought up in the Smith Committee hearings with Leiserson as the opening and star witness for labor's foes.[28]

Testimony concerning the Witt/Leiserson power struggle was only the tip of the iceberg at the Smith hearings. Critics charged that the Board itself was divided into distinct ideological factions. Much testimony, for instance, criticized the work of the Division of Economic Research and its chief economist Edward Saposs, accusing him of communist ties.[29] The Review Direction, under Witt's supervision, was also accused of leftist influence, while the Litigation Section was perceived as being guided by a conservative ideology. The Smith Committee also heard from NLRB regional directors, trial examiners and reviewers to present further testimony on Witt's "goon squads" that apparently pressured the regions to follow leftist policy at the expense of the reviewer's jobs.[30]

In addition, regional directors and trial examiners testified to breakdowns in the separation of functions at the Board. For instance, among other instances, the Committee heard about a case in which the regional director gave advice to the trial examiner on cross-examination of witnesses, actions that the Committee condemned as improperly mixing the Board's prosecutorial and adjudicative functions.[31] The Committee also heard evidence from the files of seven trial examiners whose conduct was alleged to have been improper. One examiner testified how in one case, the regional directors, the Board's attorney and trial examiner would meet to discuss weaknesses in the Board's cases and to discuss strategies to improve it.[32] Such

[28] Smith Committee Hearings, vol. XXIV, part II, pg. 5799-5802.

[29] Smith Committee Hearings, vol. 17, pg. 3413-86, 6895-6910.

[30] Smith Committee Hearings, part III, pg. 679-81; part IV, pg. 789-806.

[31] Smith Committee Hearings, part IV, pg. 852-78.

[32] Smith Committee Hearings, part VII1, pg. 1704-1798.

conduct led the Committee to later report that there was an "almost complete dependence" upon the Chief Trial examiner by other trial examiners, thus calling into question why there was so much outside intrusion into the judicial process.[33] The Smith Committee was appalled by the fact that Board attorneys who worked by the trial examiner or who assisted the Board had access to records that the opposing party had no access to. The Committee also was opposed to the Review Section, which was composed of a group of lawyers who assisted the Board in its analysis of cases, by among other duties, submitting to the Board opinions on cases.

The evidence adduced at the hearings paved the way for Smith to introduce a bill, H.R. 8813, that would have radically altered the structure of the NLRB – and which would serve as a blueprint for the later changes made by Taft-Hartley (Gross 1981). After rejecting more radical proposals, including proposals that would have split the agency into two separate sections, the Committee finally agreed to a slightly modified proposal whereby the NLRB would be dismantled and the President would appoint a Board composed of three members, with the caveat that two members be of the same political party. Harkening back to the way the Board was structured prior to the Wagner Act, the current roster of NLRB's judicial and prosecutorial functions would be split up, with the Board retaining control over its judicial functions with an independent Administrator taking control over prosecutorial functions, such as issuing complaints and putting forth cases before the Board. The Smith bill also eliminated fiefdoms of influence within the NLRB itself by prohibiting the Board or Administrator from appointing any entity to do statistical work, a provision that implicitly served to disband the Board's Economics Division – an entity within the Board charged with leftist influence. In addition, the Smith bill

[33] House Special Committee to Investigate the NLRB, 76th Congress. 3d sess. Washington D.C.: GPO, 1940, pg. 44 (hereinafter, "Smith Committee Intermediate Report").

brought back the idea of circuit court review of NLRB bargaining unit determinations, a power that the Wagner Act eliminated because it resulted in too much endless litigation in election cases. Finally, the Smith bill strengthened the judicial process. It would have mandated that the NLRB follow the rules of evidence in court cases, and it would have required that findings of fact be supported by the more stringent "substantial evidence" standard rather than the more easily met "clearly erroneous" barrier.

During this same period, the NLRB organized itself to become less centralized (Gross 1981). Chairman Millis set up a separate Administrative Division to oversee the regional offices and the issuance of complaints. He sought to decentralize the work of the Board by putting more responsibility in the hands of the regional divisions, who had often complained about being too controlled by the center under Secretary Witt's tenure (Shulman 1941). Whereas before the center had control over case issuance, now the regions could decide on initiating case proceedings, with only the most "perplexing and novel issues of law or procedure" being decided by the Board.[34] These changes were quickly implemented in practice. By 1942, 70% of the unfair labor disputes and 86% of the notices for hearing in representation cases were handled by the regional office without prior interference from Washington (Millis and Brown 1950, 55).[35]

The changes appeared to have their intended effect, as the new Millis Board seemed to be more sensitive to the desires of industry, as least on a doctrinal level. After the changes were

[34] NLRB 6th Annual Report (Gross Archives). Specifically, the Board delegated to the Field Division responsibility for deciding requests for authorization to proceed in representation cases, unless a new policy needed Board guidance. For unfair labor disputes, a new Authorization and Appeals Committee had power to act, except that the Board retained power if the issue was an important policy matter.

[35] Millis also made some changes to how cases were presented to the Board. For instance, the trial examiner's formal report would serve as the basis for the Board to hear the case; before the changes, the attorney's oral presentation served as the primary information source for the Board. The NLRB also took other measures to standardize practices between the regions.

made, the Board issued several decisions upholding a narrower unit for collective bargaining. Under Madden's leadership, the Board upheld a narrow unit in only 5 of the 27 decisions, whereas the Millis Board upheld the narrower unit in 26 cases out of 37 (Millis and Brown 1950, 1942). Individual Board members did not suddenly change their decisions; rather, the dissenting vote simply switched from Leiserson under the Madden Board to Smith under the Millis Board. Further, the Millis/Leiserson alliance altered Board precedent on unfair labor practice matters. Board member Smith dissented on many of these decisions and despite Smith's protestations, Roosevelt choose not to reappoint him, instead choosing the Department of Labor's solicitor Gerald O'Reilly as Smith's replacement and the only lawyer among the three-member Board.

The Road to Taft-Hartley

During the war and postwar years, the Board's membership shifted several times as it confronted new challenges. The Board continually fought turf wars with the National War Labor Board (Gross 1981). Following passage of the War Labor Disputes Act, the Board had to deal with many cases concerning conduct strike votes. Leiserson and Millis left the Board, in 1943, and 1945, respectively, leaving O'Reilly as the only Board member to remain on the Board during the post-war years. Former Congressman John Houston replaced Leiserson, and later became a consistent pro-labor voice, and Paul Herzog – who had a great deal of practical experience in labor relations - gained the chairmanship in 1945. Herzog was particularly sensitive to public opinion, so it would come as no surprise that decisions during his reign shifted in a pro-conservative direction in line with the changing public opinion concerning unions (Gross 1981, 248-250). Critics even charged that Herzog even manipulated the timing of issuing decisions to forestall congressional investigation. For instance, former Chairman Millis charged that Herzog issued a particular decision in a rushed matter so as to get it out before a House

Appropriations Committee meeting as well before a House Military Affairs Committee consideration of a legal matter. The Board also continued to delegate more responsibilities to the regions. By mid-1946, the regions had not only obtained responsibility for initiating action but they increasingly became in charge of initiating contempt actions and in determining compliance.

Yet despite the Board's move to the right, forces continue to clamor for changes to the Board – changes that were at the heart of the defeated Smith bill. These calls came despite the fact that many of the "allegations" brought forth during the Smith hearings were very much overblown as noted in the minority report of the Smith hearings. Representatives Arthur Healey and Abe Murdock said that there was in fact only one time where a Review Attorney had access to the record, and that was only for purpose of reviewing a letter urging expeditious treatment (Gross 1981). Further, the minority report found only two instances of improper discussions between trial examiners and review attorneys, and both cases were in non-adversarial representation cases.[36] By and large, it was widely perceived that the Board actually did adequately safeguard its prosecutorial and judicial separate functions, and that claims to the contrary were overblown by labor opponents and by the Smith Report.

These calls also came despite the fact that a mere year earlier, Congress has passed the Administrative Procedure Act ("APA") following nearly ten years of study of the inner-workings of administrative agencies. The new act required internal separation of the adjudicative and prosecutory functions so as to prevent those who investigated the cases from having influence over those who decided the ultimate outcome. The Attorney General's Committee on Administrative Procedure studied the inner workings of the NLRB and concluded

[36] Smith Committee Hearings Minority Report.

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that the self-initiated changed instituted by Chairman Millis and Herzog sufficiently satisfied the Act's requirement that judge and jury be separate (Findling 1971).

Yet, despite the fact that the Board had already effectively addressed internally the criticisms brought up during the Smith hearings, the political environment of post-war America set the stage for the high-profile attempt to repeal the gains of organized labor. Republican wins in the 1946 midterm elections and public opposition to postwar strikes served as the first signs that the political climate postwar was very different than that existing during the heydey of the Great Depression. With labor foes now gaining control of Congress, changes to the Wagner Act could finally be enacted and conservatives – who had filed 169 bills on labor policy since 1937 – could finally get their wish (Gross 1981). Critics "objected not so much to the particular allocation of specialized tasks under the over-all control of the three-men Wagner Act Board as, more urgently, to the kinds of decisions that emerged through this structure" (Scher 1962, 329). Using the Smith bill as a model, Fred Hartley, of the House Committee on Education and Labor, drafted a bill in 1947 that would formally put into place many of the internal changes envisioned by the Smith bill. As Hartley said: "Every one of us who has studied the administration of the National Labor Relations Act knows that not only has it failed in many particulars because of its inherent weakness as a law, but it has failed in larger degree by the improper administration by members of the Board and its subordinates."[37] The Hartley bill, among other things, proposed elimination of the NLRB and replacing it with a three-member board that would solely decide cases; a separate and independent prosecutor would organize cases for presentation to the Board. This prosecutor, the House Committee Report said, would not act as "prosecutor, judge and jury," but would instead decide cases in a "fair and impartial" way and "not according to

[37] 95 Congressional Record 3533.

prejudice and caprice, as the old Board so often has done, but according to the facts."[38] The Hartley bill would have also made some of the changes envisioned by the Smith bill, including providing for enforcement of collective bargaining arrangements in federal courts and in formally eliminating use of economic analysis in cases (Gross 1981). The Senate version of the bill, proposed by Robert Taft, was different than the House version. Instead of abolishing the NLRB, it proposed expanding it to seven members; the Senate version also did not mandate the kind of wholesale administrative changes envisioned by the House bill as it instead just abolished the Review Section and it set forth the isolation of the trial examiners from the judicial process. The Senate bill, for instance, did not provide any mechanism for separating out the adjudicative and judicial functions of the Board.

Many of the changes of the Hartley bill survived the conference, as the conference bill provided for formal separation of the judicial and prosecutorial functions by setting forth the Board as the adjudicative arm of the agency with an independent General Counsel nominated by the President as the prosecutorial arm of the agency (Gross 1981). The most non-controversial change was the expansion of the Board which was a compromise between the House version of the bill which advocated a new three-member Board started from scratch and the Senate version that advanced a seven member Board. The idea of a "General Counsel" being the independent Administrator originated in the Senate version of the bill, but the actual idea of creating separate bodies was in the House version. As Hartley said, naming the "Administrator" the term "General Counsel" was seen as a minor concession to make the Senate. Under section 3(d) of Taft-Hartley, the General Counsel would have sole authority to investigate charges of unfair labor practices and to issue complaints. The Board retained control over conducting

[38] House Committee Report No. 245.

representation proceedings and the Board retained authority as the adjudicatory branch for both unfair labor practices union shop proceedings. The bill eliminated the Review Section, which had previously been in charge of screening cases for the Board and in some cases, writing drafts of decisions. In its place, the new law gave Board members greater power as a group of law clerks would instead assist Board members with the many decisions they were charged to handle. The General Counsel also had sole supervisory authority over attorneys and personnel in the Regional offices.

The bill also granted greater power to the reviewing court. It provided that the rules of evidence would apply in NLRB proceedings as it was thought that it was necessary to limit the supposed practice of substituting the Board's opinion for legal evidence.[39] As the Committee report noted, "Requiring the Board to rest its findings upon facts, not interferences, conjectures, background, imponderables, and presumed expertness will correct abuses under the act." The bill also slightly modified the requirements for finding an unfair labor violation. Whereas under the Wagner Act, violation was based upon "all the testimony taken," the new law adjusted the requirement so as to find an unfair labor practice on "preponderance of the evidence." As the conference report noted, requiring preponderance of the evidence would require that the Board actually show that the evidence is sufficient, thereby increasing respect for the Board. Another "legal" change concerned a more exacting standard of review at the appellate level. The bill also gave certain courts power that they did not have before. Harkening back to the days before the Wagner Act, Taft-Hartley reimposed appellate court review of bargaining unit determinations. The law also lets aggrieved parties to bypass the NLRB and go to courts directly for contract breaches and secondary boycotts.

[39] H.R Report No. 245, 80th Congress, 1st Session 41 (1947).

Not surprisingly, the NLRB opposed many of these structural changes (Gross 1981). In his testimony before the House committee in 1947, Chairman Herzog questioned why the NLRB was being signaled out for special treatment. He noted that the Board sufficiently separated out judicial and prosecutorial functions in compliance with the 1946 Administrative Procedures Act. The Board particularly opposed the creation of what they felt amounted to a "labor czar" as a counterweight to the Board – the General Counsel. As Leiserson put it, "the possibilities of conflict of authority between [the Board and General Counsel] are many, and these will be conducive neither to good labor relations nor good administration of the law."[40] The Board also decried the bill's prohibition against it doing economic analysis – a provision the Board felt precluded the Board from being able to be the expert it was suppose to be. The bill, the Board thought, shifted power away from the Board to courts that would be able to override Board decisions and to question the Board's expertise. Truman too disliked the changes (Gross 1981). In his Taft-Hartley veto message he said: "The bill would create an unworkable administrative structure for carrying out the National Labor Relations Act. The bill would establish, in effect, an independent general counsel and an independent Board… It would invite conflict between the Board and its general counsel, since the general counsel would decide without any right of appeal whether charges were to be heard by the Board. By virtue of this unlimited authority, a single administrative official might ususp the Board's responsibility for establishing policy under the Act."[41]

The unnecessary nature of the changes was just one point among others brought alive during the Senate debates on the measure (Gross 1981). There was much discussion that the new

[40] Legislative History of Taft-Hartley, 2:1575-86.

[41] H.R. Doc. 80-334. at 6 (1947).

act would create a "labor czar" who would have unreviewable power. This division of labor, some thought, would consequently frustrate the administrative process because it would create two separate lines of authority so as to make the new law unworkable as a practical matter.[42] Sponsor of the bill, Senator Taft, responded to these criticisms by noting that the bill would make little change to the procedures and regulations that the Board was already operating under. He also noted that Board members would retain whatever power they already had, because in practice, the Board itself was not choosing which cases to initiate; rather it was an anonymous group of subordinate employees, mostly in the regional offices, that decided which cases to prosecute. Thus, what the new bill did, Taft said, was to "simply to transfer this 'vast and unreviewable power' from this anonymous little group to a statutory officer responsible to the President and to Congress."[43]

In addition to the structural changes, the Taft-Hartley act did much to change the personnel of the Board, as it created three new positions that needed to be filled. Truman appointed two new members, Copeland Gray and Abe Murdock. Copeland was seen as more conservative while Murdock was viewed as more liberal. It was anticipated that Copeland would align with Reynolds and Murdock would align with Houston on votes, with Herzog serving as the tie-breaker (Gross 1995, 24). Truman appointed as General Counsel Robert Denham, who was a sixty-six year old former NLRB trial examiner known for his conservative, abrasive personality. Some members of the Senate were none too pleased with some of these appointments, so Truman only was able to get them through as recess appointments until the Senate could vote on them in January 1948.

[42] 93 Congressional Record 6608, 6613, 6614, 6655, 7677.

[43] 93 Congressional Record 6644.

Aftermath of Taft-Hartley

As illustrated through this history, the NLRB's founders and the subsequent Congress that altered the NLRB through Taft-Hartley made a deliberate attempt to set forth a clear principal-agent relationship whereby the agency would largely be free to operate outside congressional and judicial control. The changes to the NLRB brought about by Taft-Hartley concerning its structure were merely meant to solidify Congress' desire for the agency to act like a court. Practically, the two-headed arrangement likely had little impact on changing case outcomes for the vast majority of cases. The internal structure put in place by Taft-Hartley – and which was basically an adoption of the recommendations of the Smith Committee – created an agency that had a different relationship with its political principals than its predecessor and it was postulated that the changes would bring about a change in Board decisions. As Scher (1962, 328) noted, change of the Board from "a multimember board of three… into an agency with two separate and generally independent branches – a five-member board and a General Counsel – was achieved by particular men in order to achieve particular results." Those "who viewed the Wagner Act as unfair to employers and saw the Board as an agency hopelessly biased in favor of unions and unionization urged some kind of architectural overall of the agency along with substantive changes in the law" (329). The structure put in place – unique among agencies – set up the Board to be an expert fact-finder, whose decisions would be subject to limited judicial review. In most respects, the Board was seen as being an expert decision-maker who could make decisions free from the reins of direct political control.

Chapter 3: The Empirics of the NLRB through the Clinton and Bush Years, 1993-2007

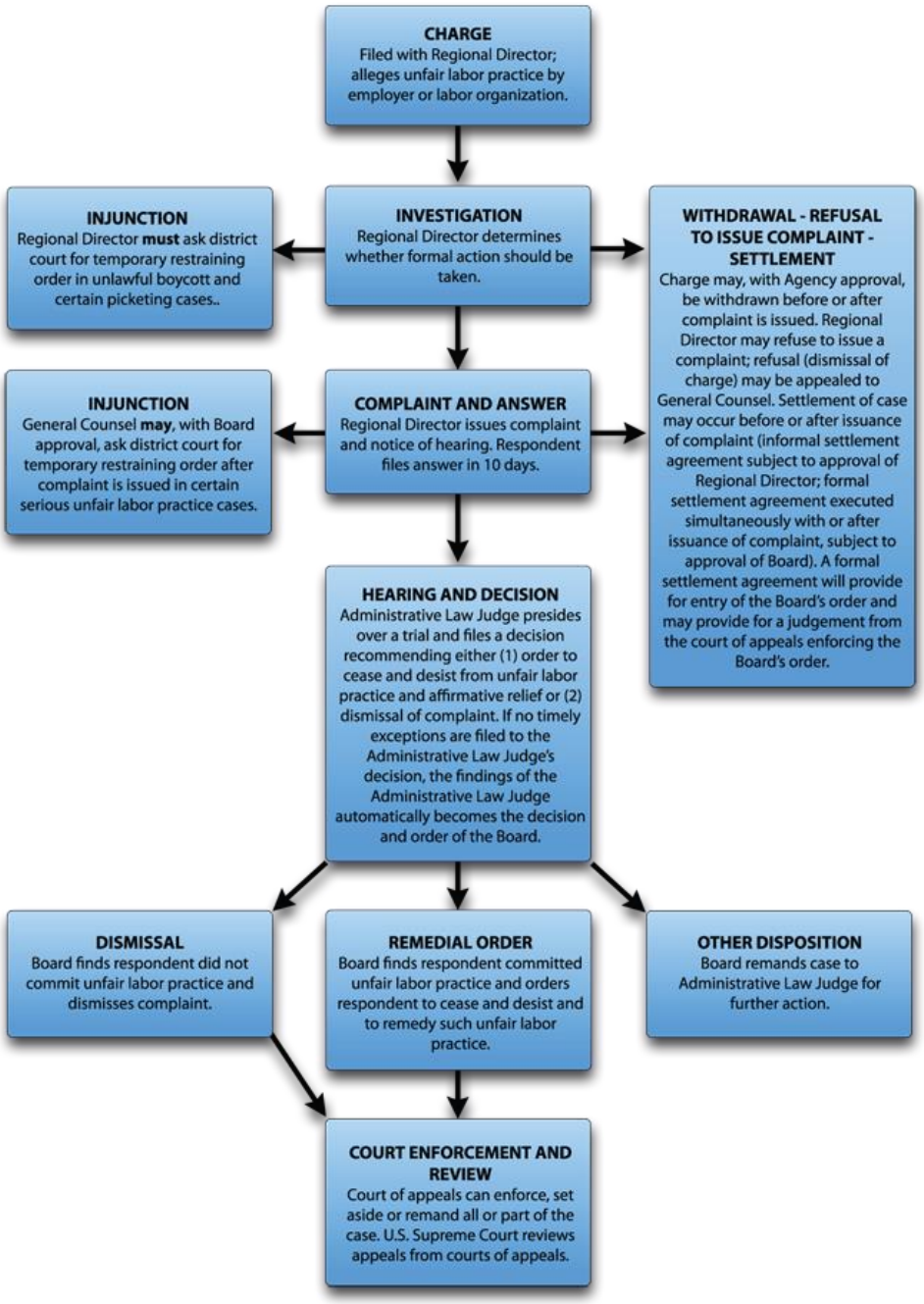
As detailed in Chapter 2, the founders of the NLRB and those who worked to reshape the Board after the war intended for it to function very much like a labor court. Does the NLRB of today act like a court? Despite the fact that administrative agencies, like the NLBR, handle so many tasks that affect the lives of everyday Americans, we know very little about how agencies operate empirically. While the NLRB issues annual reports of its filings, there has been little to none systematic analysis of how the Board actually makes decisions. In this chapter, I seek to correct the deficiency in the literature by recounting the emprical data underlining NLRB decisions during the Clinton and Bush presidencies. In Part 1 of this chapter, I outline the process by which cases are filed at the NLRB. In Part 2, I set forth my empirical strategy and explain how I analyzed case outcomes from the Board. Finally, in Part 3, I lay out the raw empirical data of NLRB adjudications spanning the Clinton and Bush presidencies in order to show how the NLRB rules during both a Democratic and Republican administration.

NLRB Process

As recounted in Chapter 2, by design, the NLRB is both a regionally-based as well as a nationalized agency. Individuals, labor unions, or employers may petititon to the NLRB to rectify an alleged grievance. The NLRB handles a vast array of disputes, ranging from deciding representation issues with respect to union elections to unfair labor dispute cases to deciding whether or not to issue a labor injunction. Many cases heard by the NLRB concern representation cases; the NLRB designates these cases by the prefix "R." Another large subset of cases – the cases studied in the present analysis – concern unfair labor dispute cases, of which there are two types: cases filed alleging unfair labor practices of employers (labeled "CA" cases) and cases alleging unfair labor practices of unions (labeled "CB" cases). CA cases allege one or more violations of the five parts of section 8(a) of the National Labor Relations Act. Section

8(a)(1) claims – the most common allegation raised – concern employer inference with the right to join or assist a labor union. Section 8(a)(3) or 8(a)(5) complaints are also common. Section 8(a)(3) alleges that an employer discriminated against an individual with respect to hiring or the tenure of their employment because of their involvement with a labor union. Section 8(a)(5) imposes a "good faith" standard; it concerns the refusal of employers to bargain in good faith with its employees concerning unionization. Less common allegations concern section 8(a)(2) (concerning interference with the formation of a labor union) and section 8(a)(4) (concerning discharging employees who have testified against the employer). In addition to CA cases, the NLRB also hears CB cases that involve allegations against unions. CB cases allege violations of section 8(b) of the NLRA concerning similar actions as under section 8(a) with respect to employers. For instance, unions may discriminate against an individual just as an employer might under section 8(a) in a CA case. Figure 1 sets forth the procedure.

Figure 1: NLRB Review Process



Source: NLRB website (www.nlrb.gov, last accessed May 17, 2015).

The aggrived party first files a case on a local level with one of fifty-one regional offices of the NLRB headquartered out of four main offices in New York, Atlanta, San Francisco and Washington D.C. Once a charge is filed, the Regional Office investgates the facts and analyzes

the merits of the case.[44] They decide whether the case should advance to the next level to be heard by a regionally-based Administrative Law Judge ("ALJ") specialist who only hears NLRB cases. If charges are not brought, the Regional Director has the authority to dismiss the complaint if he or she feels that there is not enough evidence to proceed. The Regional Director's decision is supposed to be based exclusively on whether the case has "merit" and is not meant to be an indicator of whether or not the case will ultimately be decided favorably by the Board. His or her authority is circumscribed by a reasonableness standard, a standard articulated in the legislative history that the General Counsel should only issue a complaint if he or she has reasonable cause to believe that an unfair labor charge is true (Concannon 1986). At all stages in the process, the NLRB, along with the parties, encourages settlements, with about 90% of cases initially brought ending in settlement agreements, usually before even reaching the ALJ level. Most cases do not advance out of the regional level.

Once the Regional Director opines that a case has merit, the ALJ from one of for divisions – Washington D.C., Atlanta, New York or San Francisco – goes to hear the case.[45] The ALJ is charged to determine the facts in dispute and for all intents and purposes acts similar to a federal district court judge in hearing the case except they do not have life tenure and are not Article III judges; rather ALJs are merit employees who are hired through the civil service process rather than being politically appointed. The ALJ will usually conduct a hearing at the location of the charged party, usually the employer. They are charged to make credibility determinations and to establish a trial record for later courts (such as the NLRB or future

[44] The Case Handling Manual sets forth the standards, and states that if there is an issue of dispute, a complaint should issue if they cannot decide on credibility.

[45] The respondent has a limited period of time to respond to the Regional Director's allegations; if they fail to respond, the NLRB has the authority to enter a default judgment for the aggrieved party.

appellate courts) to review to make their decisions. At the hearing, the party who brought the charges – which in most cases is the labor union or an individual who feels wronged by an employer – can be represented by counsel. Moreover, in addition, the NLRB General Counsel also represents the charging party and as a consequence he plays a large role in the hearing as he, as head of the Regional Officer's Division, is charged to investigate all facts underlying the unfair labor practice complaint. Unlike ALJs, the General Counsel is a political appointee. As noted in Chapter 2, the NLRB is unique in this regard with having a separate General Counsel who is held accountable to the President. It is one of the main features that the founders of Taft-Hartley put in place in order for the NLRB to act more like a court rather than a labor advocate. After a hearing, which in many cases involves oral argument, the ALJ returns to his or her office to write up their decision where they decide the merits of the unfair labor practice complaint. Again, at all stages, parties are encouraged to settle and they often do either immediately before or after the ALJ decision.

Once the ALJ issues his or her decision, the losing party can appeal the case to the full NLRB in Washington D.C. The full NLRB is composed of five members who are all appointed by the President for five year terms. Though not required by statute, recent presidents have followed a custom of appointing a new member of the same party of the departing member, even if that party differs from that of the President himself. The Board also operates under the informal norm of no more than three members of the Board being from the same party. The Clerk's office at the NLRB randomly assigns cases to three-judge panels. Occassionaly, however, usually on the order of one to ten cases per year, the full five member Board will hear a case. This will usually happen when a case is seen as being especially precedential or important

in the development of labor law. Board members themselves choose whether to escalate a case for consideration by the *en banc* Board.

As a technical matter, a losing party appeals by filing what is known as "exceptions" to the ALJ's order. Since the ALJ oftentimes splits his or her decision (finding some parts in favor of one party and other parts with respect to another party), it is not uncommon for multiple parties to file exceptions and cross-exceptions. Moreover, the General Counsel, charged by statute to represent the aggrieved party, will often himself file exceptions to cases in addition to the losing litigant. Since ALJ decisions are not themselves precedential without the backing of Board precedent, on ocassion, the General Counsel may be especially motivated to file exceptions where the case concerns an important legal principle that may be of use in future cases. The General Counsel, as a repeat player, may thus be motivated to file exceptions in certain cases rather than others. The General Counsel is not of course the only repeat player. Many of the cases are brought by the major labor unions such as the Teamsters, so it is not uncommon for a party to have multiple cases pending before the Board at any one time.

Once a party files "exceptions," the Board hears the case and then issues a decision. Nearly all cases are heard by a three-member Board that is randomly assigned. Many times the Board chooses simply to uphold the ALJ's decision without modifications. The NLRB functions in many ways like an appellate court and thus is not charged to retry the case; rather they are charged to make sure that the ALJ's decision is rooted in evidence. As such, in nearly all NLRB decisions, the Board makes clear that credibility determinations are exclusively the province of the ALJ. Many aggrieved parties file exceptions because they disagree with the ALJ's credibility determinations, but as a legal matter, the Board lacks any discretion to do much with respect to that. Thus, many Board decisions are only a few paragraphs long. In about a third

of the cases, however, the Board will issue a longer opinion explaining its rulings. The Board is more prone to issue a longer opinion either when they disagre with the ALJ's ruling or when the issue is of great legal importance for future cases. The Board also can affirm the ALJ's order only in part. Moreover, in some cases, the "winning" party appeals the Board's order because they want another remedy. As such, on occasion, the Board hears the case only with respect to the remedy and not with respect to the merits of the unfair labor practice dispute.

As an example to see how a case progresses, take the case in *Yellow Freight Systems*. In the case, the ALJ found that the employer violated sections 8(a)(1) and 8(a)(3) of the Act by refusing to hire Mr. Martinez as a permanent employee because he engaged in protected activity under the Act. The ALJ also found that the employer violated section 8(a)(3) because it threatened to terminate employees immediately if they walked out, notwithstanding contrary provisiions in the parties' collective bargianing agreement. After the ALJ's ruling, the employer objected. The Board affirmed the Board's holding. The issue was later appealed to the federal courts of appeal which also affirmed the ALJ ruling. Many of the cases that the NLRB hears are similar to *Yellow Freight* where an employer is alleged to have violated the NLRA because they unlawfully fired an employee (or a set of employees) engaging in protected conduct under the NLRA. Protected conduct may include, for instance, any activities that might promote unionization. Cases also often allege section 8(a)(5) violations whereby employees accuse the employer of failing to "bargain in good faith" with the union.

Some cases go through a unique process between the ALJ and the Board. A small portion of cases go through multiple rounds between the ALJ and the Board. About 5% of Board decisions are known as "supplemental" decisions. During the first time the Board hears a case, it may decide to remand the case back to the ALJ to determine a factual issue important for the

balancing of the legal issues. The case can then in turn be appealed back to the NLRB. Oftentimes supplemental case deal with the remedy at issue in the case. Still other cases go directly from the Regional Office to the Board. This is most often the case where the party found to have violated the law fails to file a response. In that case, the aggrievd party or General Counsel can file for a default judgment directly before the Board. Moreover, on occasion, the General Counsel will file a motion for summary judgment before the Board, opining that there is no "genuine issue of material fact" with respect to the unfair labor disputes at issue in the complaint filed at the regional level.

The last step in the process involves the federal judiciary. If the dispute involves a question of fact, the losing party can appeal to the federal district court to try to have the district court review the case again. This process is quite rare. More commonly, parties dispute questions of law which are appealed to the federal appellate courts directly without having to go through the intermediary of the federal district courts. NLRB orders are not self-enforcing; this means that if a party wins before the NLRB, it may need to go to federal court to have its order enforced if the losing party does not agree to abide by its voluntarily. Many times the party found to have violated the NLRA complies with the Board's decision, but occassionally they do not. The winning party before the NLRB can then bring charges to enforce the order in federal court. Likewise, the losing party can also bring a claim in federal court challenging the merits of the NLRB decision. Similar to the relationship between the ALJ and the NLRB, the appellate federal court acts not as a trier of fact, but rather hears all issues with respect to the application of law to the case at hand. Appellate courts, like the NLRB, must rely on the ALJ to make credibility determinations with respect to witnesses. They simply review whether "substantial

evidence" supports the Board's decision.[46] Cases can be appealed to either the United States Court of Appeals for the District of Columbia or to the regionally-based appellate court with a nexus to the charged parties. Like both the ALJ and the NLRB, the federal court will often split its decision, finding some parts with respect to one party and other parts with respect to the other party. Consequently, many cases involve multiple cross-petitions. For instance, in many cases, the General Counsel seeks enforcement of the Board order while the losing employer before the Board files a petition or cross-petition objecting to the merits of the Board's decision. Oftentimes if the federal court disagrees with the Board's holding, it will remand the case back to the Board for further procedings. As such, legal cases concerning important legal issues often go through multiple rounds between the ALJ, the NLRB and the Board. Unlike many agencies, however, the NLRB ascribes to a policy of non-acquiescence with respect to the decisions of the federal appellate courts. Because the NLRB feels that it is a body charged to uniformly apply labor law, it does not consider the decisions of the federal appellate court's precedential; rather it considers only Board decisions, especially Board decisions of five member panels, to be precedential. As such, the Board oftentimes will flagrantly ignore federal appellate court decisions with which it disagrees. In other words, if the Sixth Circuit applies a given precedent to a case, the Board does not feel compelled to abide by that precedent when they hear cases that arise from the Sixth Circuit. Appellate courts have the option of asking the *en banc* Court to hear an NLRB case, but hearing by the court rarely occurs.

As a final and rare step in the case hierarchy, after multiple rounds between the various bodies, a party can also appeal the federal court decision to the United States Supreme Court. The Supreme Court only rarely hears NLRB cases; usually, it will hear a case on the order of one

[46] *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

or two every other year. The Supreme Court will usually only hear an NLRB case that involves legal issues applicable to other administrative agencies, such as deciding the wisdom of quorum requirements or in assessing what standard should apply to reviewing decisions of the Board. With a limited docket of only eighty or so cases a year, the Court simply has neither the time nor inclination to hear many NLRB cases. As such, as a practical matter, the decision of the appellate is the last conceivable step for review of an NLRB unfair labor practice case.

Empirical Design

To analyze the NLRB of today and to see whether it acts consistent with its principal founding purpose of being an impartial "labor court," I looked at 2,824 NLRB cases from the Clinton and second Bush administration, from 1993 to 2007.[47] Such a sample both gives a large variety of data over two separate presidential administrations (both a Democratic and Republican administration), yet, at the same time, the period is not so long such that many omitted variables concerning time trends would cloud the analysis.[48] The status of labor remained largely unchanged during this period; Congress passed no major labor laws since the 1950s (Brudney et al. 1999),[49] and public support for unions remained fairly constant with no new laws being passed or labor issues being of prominence during electoral contests. President Clinton had the unique opportunity to be able to transition the Board to Democratic control in his first year in office; furthermore, within the first year of his presidency, he had the opportunity to appoint a

[47] I deliberately excluded cases from 2008 because during parts of that time the Board operated with only two members, raising legal issues that were ultimately decided by the Supreme Court concerning the constitutionality of two judge panels.

[48] One could question, for instance, whether feelings about labor changed over the period under study. Labor's influence, however, largely stayed fairly consistent during the 16 year period under study.

[49] Congress last passed a labor law in 1959 adding the position of Acting General Counsel. Subsequent attempts to pass labor law reform failed. *See* Labor Law Reform Act of 1977, H.R. 8410, 95th Cong., 123 Cong. Record 23, 711-14 (1977); S. 1883, 95th Cong., 123 Cong. Rec. 23, 738 (1977); The Teamwork for Employees and Managers Act, S. 295, 104th Cong. (1994).

General Counsel.[50] President Bush faced more obstacles in his path to transition the Board. Indeed, it was not until early 2002 that the Board had a majority of its members being Republican.

I collected the cases in a few different ways. First, I looked up all the NLRB's cases on the Lexus-Nexus database by year for the period. I read each case and coded the cases a number of different ways. I first coded the cases for case outcomes, generating a "1" if the case was decided in favor of labor and a "0" otherwise. I counted it as "pro labor" if, for a case against an employer, the Board decided any part of the case on the merits in its favor (a "CA" case is one filed against an employer); for a case against a union, I counted it as "pro labor" if the Board decided for the union, finding no violation (a "CB," "CC," or "CD" case is filed against a union).[51] Likewise, to account for "pro industry" votes, I coded as "pro industry" any case decided against the employer if the case was brought by a union; I likewise coded any case brought by parties against a union as constituting "pro industry" if the Board decided in its favor. Less than 10% constitute cases in which parties file against unions; the vast majority of cases are ones brought by labor.[52]

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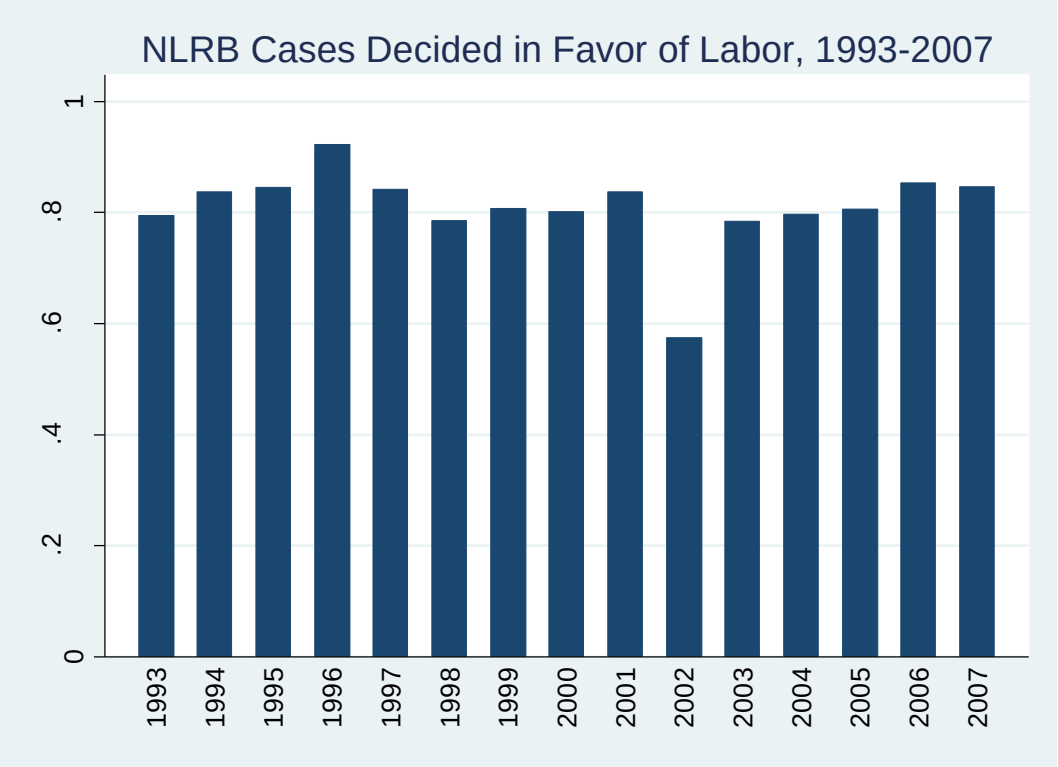
[50] Since Board members serve five year terms, there is often quite a year or two lag before the Board becomes dominated by members of the President's party. Furthermore, because the General Counsel serves a four year term, the President often does not have the opportunity to appoint a new General Counsel until the second year of his presidency, unless, as with the case with Clinton, the General Counsel retires early.

[51] CA cases are based on violations of section 8(a)(1)-8(a)(5) of the NLRA; CB cases allege violations of sections 8(b)(1)(A) to 8(b)(6); CC cases allege violations of 8(b)(4)(ii) through subparts (A) and (C); and CD cases allege violations under section 8(b)(4)(i). I eliminated cases concerning violations under CP for violation of section 8(b)(7)(A) through 8(b)(7)(C) because there were only a few cases; I also eliminated CE cases under section 8(e) because in these "Hot Embargo" cases, both the employer and union are defendants.

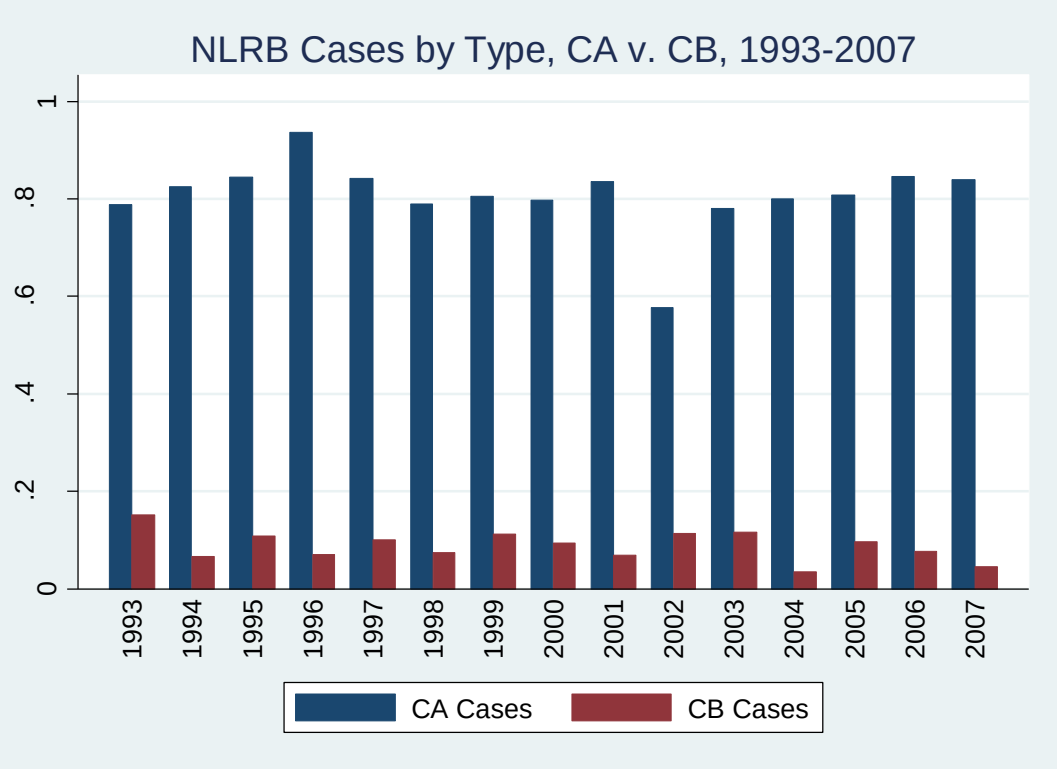
[52] CHIPS and CATS databases. Excluding settlements from the analysis could raise concerns of selection bias. As Theodore Eisenberg and Charlotte Lanver (2009) found, however, there appears to be no evidence of a material change in aggregate settlement rates over time in the cases they studied. For instance, if I sought to test the propensity of labor to prevail before the Board, excluding settlements from the dataset could bring about misleading results. However, I seek to test the impact that ideology and panel configuration have in impacting how the panel or individual judges will vote. Other scholars doing similar analysis have likewise excluded settlements from the dataset. In many cases, information on settlements is not readily available. Nonetheless, in the analysis I conducted

Figure 2



in Parts 4 and 5, I tried alternative specifications including settlements as part of the dataset. My results did not change.

Figure 3



Figures 2 and 3 presents graphs showing the percentage of cases decided in favor of labor by year. On average, the NLRB decides about 75% of the cases it hears in favor of labor each year. This number stayed fairly constant through the period under story, with some notable exceptions. For instance, during the first full year of the Bush presidency, 2002, the Board decided only between 53-57% of cases in favor of labor depending on how you code the variable. This lowered rate in 2002 is not all-together surprising. It generally takes about two years for the NLRB to hear the appeal of an ALJ decision. As such, decisions heard by the ALJ in 2000 before the presidential election may just be coming up before the Board in 2002, so the case mix for that particular year may have been different. More importantly to this study, however, is the fact that panels composed exclusively of Republicans heard almost 10% of the

cases in 2002 – the highest yearly total for the entire period under study.[53] The year 1996 is also of interest, as there about 91% of cases had a pro labor bent. Like 2002, the change in presidential administration most likely motivated this change. By 1996, Clinton finally had the opportunity to mold the NLRB more in his favor. Given there is a bit of a lag time between the ALJ decision and that of the Board, it is of no surprise that perhaps it took a few years for the more liberal spirit of the Clinton administration to pervade the NLRB as well.

To help narrow down the cases (and to also check my coding to ensure reliability), I also consulted with two databases I received from the NLRB, databases that, despite the treasure trove of information they contain, virtually no one has used before because they were not readily accessible until now.[54] Between 1984-2000, the NLRB hosted its cases in the CHIPs database, and from 1999-2010, it collected cases through the CATS database.[55] Each database, particularly the CATS database, has a treasure trove of information for scholars to study agency adjudication. The CATS database alone contains over 600 fields and more than 50 Excel spreadsheets of information on everything the agency does in its adjudication, ranging from how many cases are withdrawn to a regional breakdown of cases. I used the database to give me further information on the identity of the parties and to confirm my coding of information.[56]

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[53] Indeed, there were 44 cases total heard of panels dominated by Republicans. Ten of those cases were in 2002.

[54] The CHIPS database is available at www.data.gov and the CATS database is available at www.archives.gov.

[55] Consistent with what other scholars have done, I rely in this analysis on published decisions available on Lexus Nexus. Analysis of the CHIPS and CATs database was complicated by the fact that case outcomes are by actual case numbers. For instance, a few challengers may contest employer action and the cases may all be combined at some point for the Board to hear the cases jointly. About one-third of the Board's cases consist of such "joint" cases, and I had to work extensively to figure out which cases are combined and which are not. The CATS database for instance generates 17,323 total cases for the period 1999-2010 (though CATS does have some holdover cases from earlier periods, so this number is not exactly right), yet the Board heard only about 3,000 cases during that period.

[56] I did two things to ensure reliability with respect to cases I collected from Lexus Nexus. The NLRB CHIPs and CATS databases state the final outcome of the case at both the Board and ALJ level. By looking at the type of case (CA or CB case for instance) as well as the direction of the lower court decision, one could characterize a case as

Not all Board decisions are, or should be, treated alike. There are a few different types of Board decisions and I eliminated some types from my analysis. In the first instance, officially, the Board has to rule on any formal settlement agreement. Because Board decisions are not self-enforcing, a Board order is necessary to compel a settling party to follow through with the terms of any settlement. Thus, a fair share of cases consists of merely blessing these settlement agreements. About 2% of cases in the NLRB's database consist of these stipulated judgments. I excluded these cases from the analysis because including them would bias the results in favor of labor. Another type of Board decisions consists of automatic Board decisions. For instance, if the ALJ decision is not appealed, the Board may issue an automatic order blessing the ALJ decision. I excluded these decisions as well from the analysis. The Board also hears a fair share of supplemental decisions after the Board remands the case back to the ALJ to decide some sort of factual issue. Less than 10% of the cases appealed to the NLRB are supplemental decisions. These decisions typically concern the litigant's opposition to the given remedy ordered by the ALJ or Board. Such decisions could bias the results because they would reflect *ex post* judicial influence as the Board member would be guided in his decision by the instructions from the

pro or anti-labor. I thus had an entirely separate database by which I could check my work to see if my coding agreed with those of the agency. Sometimes I found that the agency did not always correct transcribe the final outcome of the case; in those cases, I relied on my own reading of the case. Moreover, I also obtained access to a database constructed by Cole Taratoot (2013) where, as part of a National Science Foundation Grant, he characterizes cases as pro or against labor. His database does not include all cases, however nor does it include all years. I added several hundred additional cases that I found on Lexis Nexus that were not in this database. Nonetheless, for the cases that it did include, I compared my codings to see if they coincided and where they did not, I read the case again to come to confirm my decision. Also, my analysis differed from his in some respects because I looked at who challenged the ALJ action in assessing whether or not to accord a case as being pro or against labor. For instance, if only an employer filed exceptions to the NLRB case and the employer lost, I coded the case as anti-labor, whereas Taratoot often characterized such cases as split. I considered them wholly in favor of labor because the Board was not asked to rule for the labor party; only the employers challenged the action and if the Board ruled against the employer, I considered that a case decided wholly in favor of labor. Nonetheless, I looked at the cases both ways and came to consistent statistical results no matter how they were coded. Further, I also excluded some cases from my database that Taratoot included. For instance, in the ALJ ruled on a technical or constitutional matter – such as whether the case was time barred or whether the First Amendment was violated – I excluded such cases from my analysis because to include them would complicate my central claim of trying to understand how the Board rules on unfair labor practice disputes. If the ALJ's or Board's decision deals with a technical or constitutional matter, it cannot be fairly said to have anything to do with the way the Board rules on unfair labor practice cases.

upper reviewing body (Taratoot 2013). Usually, the ALJ on hearing the case a second time will have the opportunity to correct deficiencies in its reasoning.[57] I also excluded motions for summary judgment. Motions for summary judgment require the fact-finder to decide whether or not there is any genuine issue of material fact, so the legal issue involved is quite different from whether or not there is a violation of the NLRA Further, for ease of analysis, I also eliminated cases decided by the five member NLRB during this time period. Normally, a three-judge panel hears an NLRB case; however, when the issue is particularly important, it is often heard by the five judge panel, where the full Board chooses cases much like an *en banc* court of appeals does. Because cases decided by the five-member Board are considered the most important cases, it could bias the results to lumpt those cases in with more routine cases decided by the Board. The Board typically hears between 1 and 10 cases a year in a five judge panel. I also eliminated so-called CE cases, or "Hot Embargo" cases as both the employer and union are defendants. Finally, I excluded some cases where the Board could not be said to really be ruling on the underlying unfair labor practice disputes. On some occasions, the Board decides a case on a technical or constitutional ground, such as whether or not the complaint is time barred or whether or not First Amendment rights are at issue. Alternatively, some cases deal more with the remedy at issue or decide that the case should be remanded back to the ALJ for decision. For instance, occasionally an employer concedes guilt and disputes only the remedy. I excluded these cases from the analysis so as to properly analyze only unfair labor practice disputes. I was thus left with about 2,719 cases to analyze on the merits.

[57] As discussed above with respect to settlements, excluding these other types of decisions from the dataset could raise concerns of selection bias. However, there are a few reasons why I believe such concerns to be overblown that I discuss in a later section. Many of the supplemental decisions deal with whether or not the employer owes backpay.

Empirical Data

Who Wins?

I then set out to analyze the 2,719 cases to offer empirical insight on how the Board rules. The NLRB decided cases appealed from the ALJ a mean of 547 days after the ALJ decision.[58] Many cases generate a split verdict, meaning that certain claims are decided in favor of labor and certain claims are decided in favor of industry. To address this issue, I coded cases a few ways using two coding styles, a traditional method capturing the propensity of the Board to vote in a pro labor fashion and a method that incorporates legal reasoning into it. Similar to most other scholars studying court decisionmaking, I first tried to appoint the case to one side or the other based on the general tone of the ruling by asking: Was the general tone of the case generally in favor of labor? If so, I coded the case as "pro labor." This is how most scholars typically code case outcomes. I also coded cases with an alternative specification where I coded the cases as decided fully in favor of labor, decided partially in favor of labor, decided partially in favor of industry or decided fully in favor of industry. If the Board decided a majority of the case in favor of labor, I considered it to be pro labor or leaning labor. Figure 4 displays the results using what I call "Coding Style 1- Propensity for Pro Labor Vote." NLRB decides the vast majority (46%) of cases wholly in favor of labor, with another 35% being decided partially in labor's favor. Further, the agency decides about 17% of its cases fully in favor of industry and just 2% are split decisions in industry's favor. Likewise, if I dichotomize the variable, I similarly find using Coding Style 1 that the NLRB decided any part of the case in whole or in part in favor of labor about 81% of the time. These numbers did not vary if I restricted the analysis to only CA cases levying charges against employers as about 85% of such cases end up on the labor

[58]The number of days ranged up to 4087 days with a mean of about 1.5 years.

side. In CB cases, by contrast, concerning charges against unions, the NLRB most often rules against the labor party, with only 32% of such cases being decided in labor's favor.

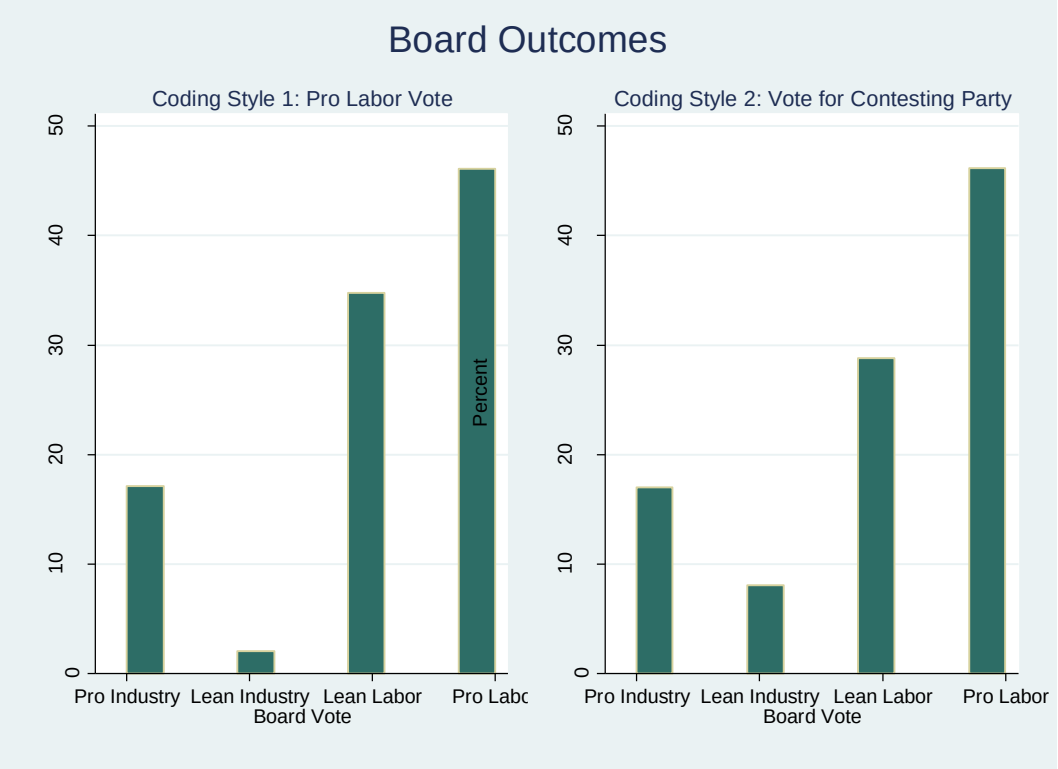
However, the coding of this variable was complicated by the fact that one needed to look at the party challenging the ALJ ruling in order to accurately code the variable**.** Political scientists often completely ignore the standard of review in coding cases. But understanding what the standard of review is key to understanding a case. For instance, an appellate court overturning a ruling under the more deferential "substantial evidence" test would be more telling than if they were charged to decide the case *de novo* (Yung 2009).[59] Moreover, scholars have found that standards of review result in real differences in reversal rates (Yung 2009; Cross 2007). As another example, suppose the ALJ issues a decision in a case filed against an employer upholding some allegations in favor of labor and some allegations in favor of the employer. The labor union may challenge the dismissal of certain allegations. If the Board rules against the labor union in this scenario, in an alternative specification, I coded the case as "0" because even though the ALJ decided most of the case in favor of labor, in essence, the party challenging the suit – here, the labor union – lost. The ALJ often splits its decisions, and the labor union, even though it "won" at the lower court level, may still appeal in the hopes that the Board will uphold additional charges against the supposedly guilty employer. Likewise, as another example, there are some cases where the employer files exceptions to the ALJ's report, and the Board rules in favor of labor. Whereas other scholars code such cases as "split," I consider such cases to be cases decided wholly in favor of labor because the Board, tasked to rule only on the pro-industry arguments, rejects those arguments when they uphold the ALJ's order. As such, I had to carefully read each case to discern both the party challenging the case

[59] Yung (2009) found a higher reversal rate for *de novo* review than for more deferential styles of review.

and the way the Board ruled on each allegation. When I redid the analysis looking more carefully at the party challenging the issue, the NLRB decided 46% of cases wholly in favor of labor, leaning in favor of labor in only 29% of cases. Likewise, this alternative coding style allowed me to allocate more cases, 17% wholly in favor of industry, with only 8% of cases being ones where the NLRB decided in part in favor of industry. Similar to what I found using Coding Style 1, about 79% of CA cases are decided in favor of labor whereas only a minority of CB cases (35%) are decided in labor's favor. No coding style is perfect, and in particular, the coding styles adopted here somewhat bias the results for labor as if the cases are split, I allocated the case to the labor side. All told, about 10% of the cases in the dataset are clearly split cases, with about 58% of those cases being mostly decided in favor of labor except for a few allegations (often minor). The remaining 42% (a total of 110 cases) really cannot be truly allocated either pro labor or pro industry, as important parts of the cases are decided in both directions.[60] A higher score for Coding Style 2 indicates a vote for the contesting labor party.

[60] There are some cases where the Board decides in favor of labor but decides a few allegations in favor of industry. If I reallocated cases like this to the lean industry side, then the Board would decide about 69% of its cases in a pro labor direction.

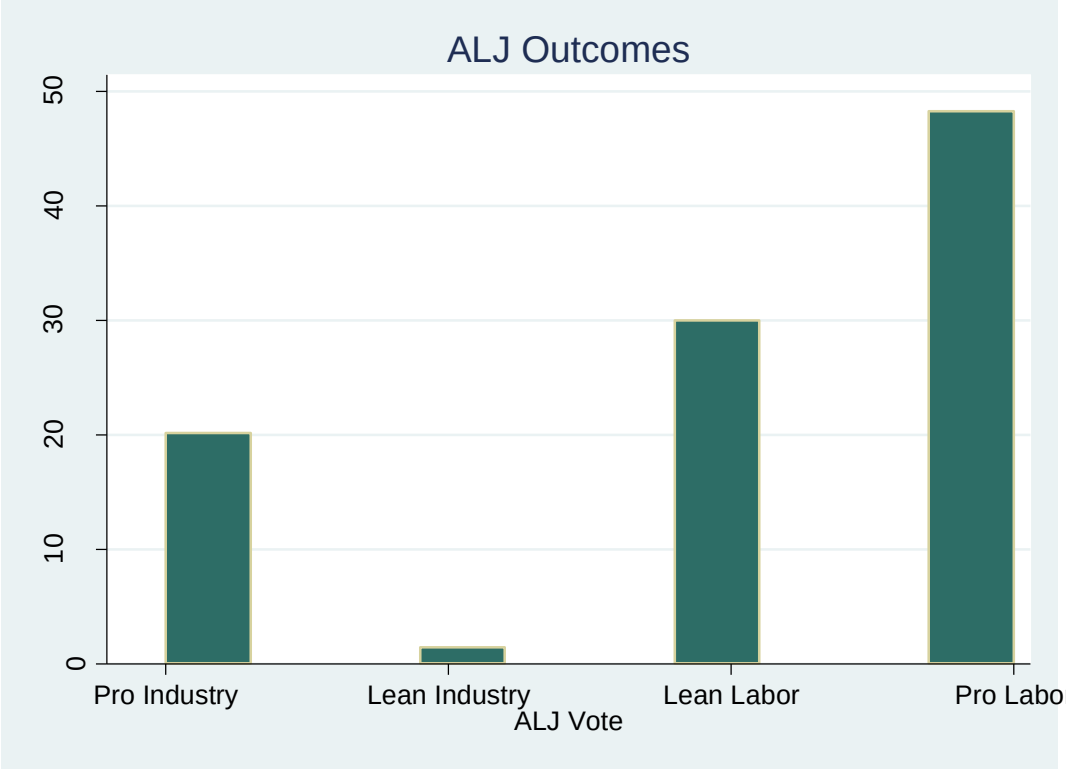
Figure 4



How does the Board review the ALJ decision?

Figure 5 presents data concerning the underlying ALJ decision that the Board reviews. About 78% of the case coming before the Board are ones in which the ALJ ruled in whole or in part in favor of labor. Broken down more carefully, of the cases that the Board ultimately decided analyzed in the present analysis, the ALJ ruled entirely in favor of labor in 48% of them and in favor of labor in part in an additional 30% of cases. Likewise, the ALJ ruled in favor of industry in whole 20% of the time, with less than 2% leaning in favor of industry in part. As such, it is quite clear that the vast majority of cases appealed to the Board are ones wholly or in part in favor of labor.

Figure 5



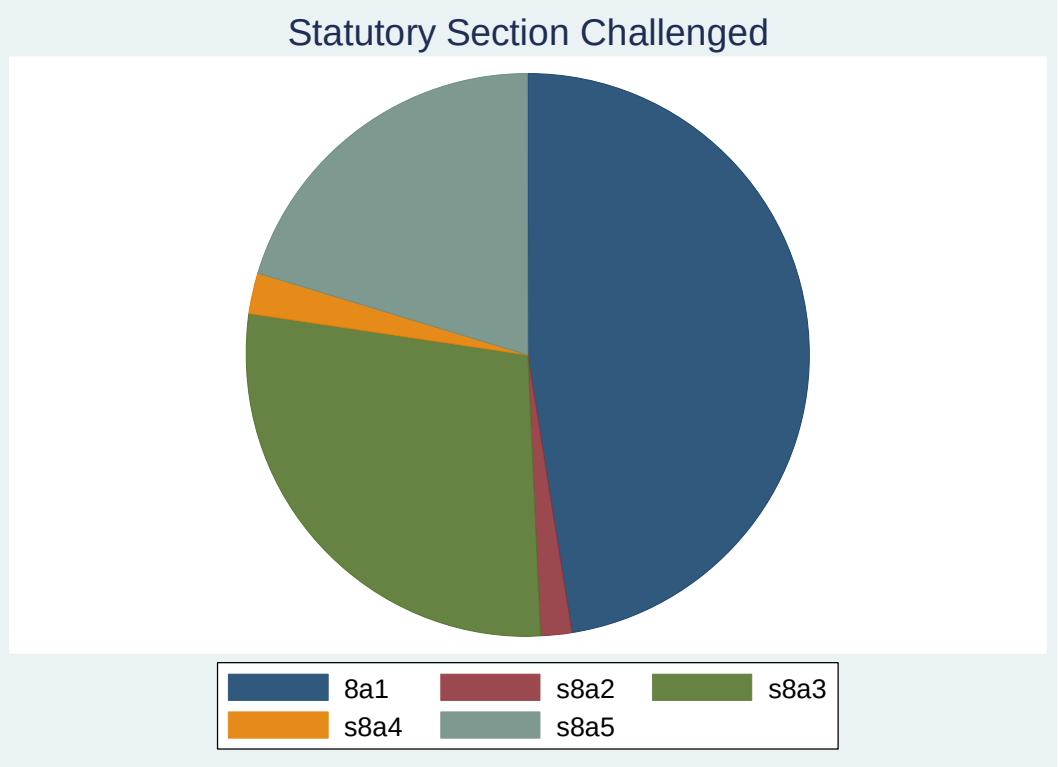
Yet, while the Board upholds (at least in part) about 80% of ALJ decisions overall, the breakdown is interesting. About 78% of the time, the Board will uphold the ALJ decision in full. In some instances, both sides object and the Board affirms in full a split decision. Using Coding Style 2 and looking at the party challenging the case, about 10% of the time the Board will issue a decision that is more liberal than the ALJ decision (in whole or in part), whereas it issues a more conservative decision (in whole or in part) about 11% of the time. This pattern is similar whether one looks at CA cases or CB cases. The Board issues more pro industry decisions than the ALJ (25% v. 22%). Looking at the data broken down dichotomously on whether the Board or ALJ rules in favor of labor or not, the Board issues a pro labor vote in

whole or in part about 82% of the time. However, if one looks at the data broken down by the party challenging the case, the Board issues a pro labor vote 75% of the time.

What parts of the NLRA are challenged?

The statutory section being challenged also plays into the analysis. Figure 6 shows a pie chart demonstrating what specific statutory sections of NLRB are most often challenged in NLRB cases. Most violations concern sections 8(a)(1), 8(a)(3) or 8(a)(5). However, many cases involve multiple charges of different statutory sections. Indeed, it is quite common for a party to allege violation of section 8(a)(1) as well as either or both of section 8(a)(3) or 8(a)(5). Indeed, in 55% of cases, parties brought joint charges under section 8(a)(1) and 8(a)(3) and 39% of the time they filed concurrent charges under both section 8(a)(1) and section 8(a)(5). In about 11% of cases, parties brought charges under all three of the most popular sections of the NLRA. As shown in the chart, only rarely do aggrieved parties bring charges under sections 8(a)(2) or section 8(a)(4); indeed, when they do they always file such charges simultaneously with allegations under other sections of the act. Interestingly, the rate by which the Board rules in favor of labor does not seem to vary according to statutory section; in most cases, it rules in favor of labor about 75% of the time regardless of statutory section, with section 8(a)(1) and section 8(a)(5) cases enjoying a slightly higher (78%) of cases being decided in favor of labor.

Figure 6



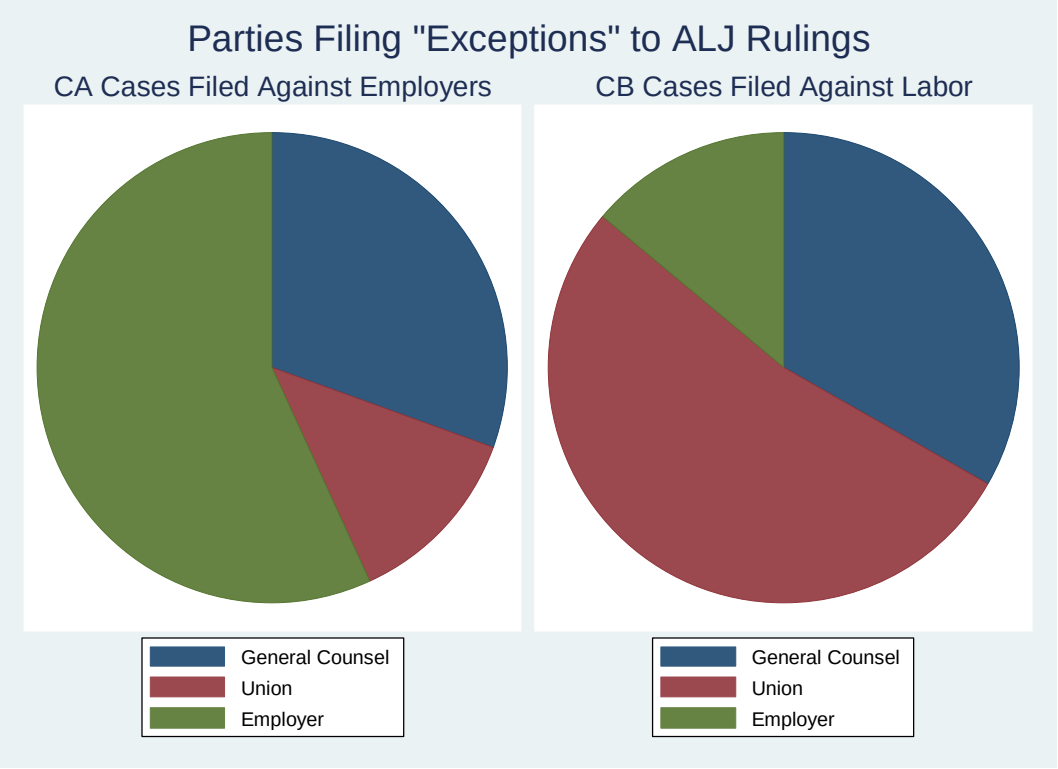
Who challenges?

As mentioned in the NLRB process section of this chapter, the NLRB General Counsel must enforce the NLRA and as such often will file his own "exceptions" to ALJ rulings that are contrary to the position he advocated before the Regional Officer. In about 45% of cases, the General Counsel will file exceptions, usually simultaneously with the aggrieved party. This figure is identical in both CA cases and CB cases. The General Counsel's proclivity to file exceptions depends on the ALJ's ruling. Overall, the General Counsel, charged to represent the agency and the public interest, is more likely to file "exceptions" to adverse ALJ rulings that have a pro labor bent than a pro industry bent. For example, in CA cases, the General Counsel files exceptions 79% of the time if the ALJ rules in favor of industry in whole or in part. In CB

cases, which are cases filed against labor unions, the General Counsel objects only 68% of the time. Figure 7 displays the results.

Employees, not surprising, file the most "exceptions" to ALJ decisions precisely because so many ALJ decisions are decided against their interests. In fully 78% of cases – and 84% of CA cases – employers file exceptions. Unions file exceptions much less frequently, both because they do not necessarily need to as most cases are decided in their favor but also because oftentimes the General Counsel looks out for their interest. As such, unions file exceptions in only about 23% of cases overall but 71% of the time in CB cases where they are judged to be the guilty party. In just under 8% of cases, the union files exceptions challenging an adverse ruling when the General Counsel fails to act. Individuals file exceptions in just under 2% of cases.

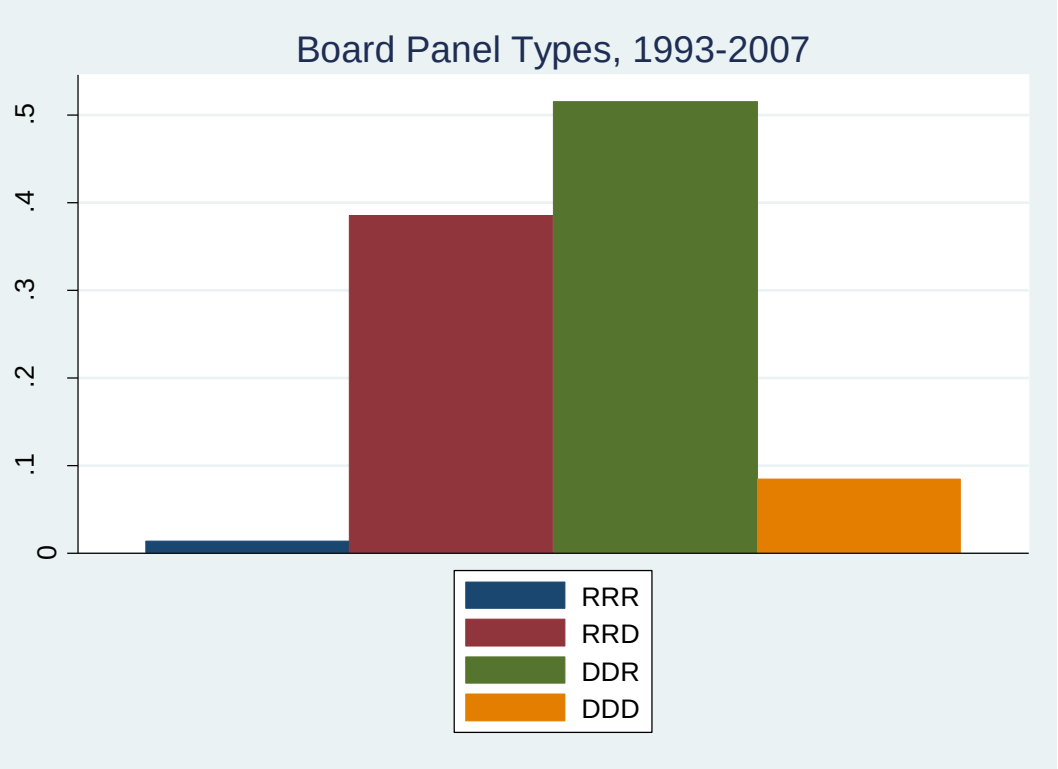
Figure 7



Do different panels decide issues differently?

Next, I look at the data broken down by time period as noted in Figure 8. Much changed on the Board in the sixteen years under study. Attached in the Appendix A is a listing of all Board members who served on the NLRB in the time period under study. All told there were a total of over 50 different panel configurations, with many different partisan makeups during the time period under study. There are some interesting time differences, with 2002 especially being of note for the fact that just over a majority of cases were decided in favor of labor. At least as interesting, however, is the breakdown among panel types. All told, 39 cases (or about 1%) were decided by all Republican panels (RRR) while all Democratic panels decided 234 cases (or 8%). Mixed partisan panels decided the vast majority of all cases. Just about a majority (52%) of cases were heard by majority Democratic panels (DDR), while about mixed Republican majority panels (RRD) heard about 39% of cases. In Chapter 4, I explore more thoroughly the impact that partisan panel effects could have in impacting the ultimate vote choice of the Board. As will be explored in the next chapter, the numbers on first glance are shocking, with DDD panels deciding in favor of labor 91% of the time while RRR panels deciding in labor's favor only 51% of the time. Of course, less than 10% of panels are composed of full partisans so it is most important to look deeper at the mixed panels that make up the majority of Board decisions during this time frame. Yet even there the panel effects, on first glance at least, are surprising, with DDR panels deciding in favor of labor 83% of the time and RRD panels ruling in labor's favor more than 10% less at 76%.

Figure 8



Who dissents?

Overall, there were 510 cases in which one member of the panel dissented in whole or in part (in other words, about 19% of the cases had a dissent). This statistic is a little misleading, however, because in over 80% of those cases, the dissent was only in part, meaning that the board member largely agreed with the majority but dissented because they felt that an additional claim should have been decided in a more pro labor or pro industry fashion. Moreover, there were only a few members who habitually dissented: Republican members Hurtgen and Brame dissented in almost every case where they constituted the minority. A careful look at their dissents, however, reveals in most cases they would simply disagree with a pro labor finding on a single allegation; indeed, less than a quarter of their dissents consisted of wholesale disagreement with the majority. On the Democratic side, member Liebman often dissented from

rulings that were not wholly in favor of labor. In other words, the majority would rule for the employee but would decide one or two allegations in favor of the employer. Liebman, by contrast, would rather rule wholly in favor of the employer. To a lesser extent, members Cohen (on the GOP side), and Gould and Walsh (on the Democratic side) also dissented, but again, often only in part. The remaining members of the Board, however, virtually never dissented during their tenure on the Board. Moreover, other than consistently dissenting in a specific ideological direction (i.e., Hurtgen always dissenting to favor industry or Liebman in favor of labor), there appears to be no rhyme or reason why some members dissent and others do not. Willingness to dissent appears to be a very personal attribute of Board decisionmaking.

Conclusion

The ready access to data of the administrative state is something that is underexploited. In order to understand how the administrative state works we must go beyond just looking at an agency's annual reports. In a seminal article in 2007 in the *Stanford Law Review*, authors Jaya Ramji-Nogales et al. (2007) set forth much empirical information concerning asylum adjudication, noting the great disparity that exists at both the agency level and in the federal courts concerning adjudication of asylum claims. With agencies increasingly making data available online, more work is needed in this regard in order to properly understand how agencies work and to question whether the agency is fulfilling its job required in a democracy. The fact that an agency may adjudicate claims differently depending on the litigant is troubling if in fact political principals like Congress and the President do not design an agency to make choices in this way. Indeed, to notice wide differences in result based on litigant raises the question of whether adjudicators are fair or whether they use their posts to advance their own political agenda. The present study is intended to follow in the footsteps of the Asylum Study to

set forth empirical information concerning how the NLRB adjudicates cases, focusing primarily on the role that partisanship has in impacting vote choice. It is to this issue that we turn to in the next chapter.

Chapter 4: Partisan Panel Effects at the NLRB, 1993-2007

In December 2012, the Republican-led House Oversight and Government Reforms Committee issued a report, entitled "President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional Union Advocate," lambasting the National Labor Relations Board ("NLRB") for the supposed "pro-union" bias of its decisions.[61] The House committee was particularly incensed with the Board's recent decision blocking Boeing's plan to move a plant to South Carolina, a state with laws unfriendly to labor unions. The House report came on the heels of increased partisan tension over the work of the Board.[62] Republicans decried President Obama's recent attempt to make recess appointments to the Board, resulting in the Board operating with just two members for well over a year and resulting in a constitutional showdown at the Supreme Court.[63]

This recent episode between President Obama and Congress over the NLRB harkens back to similar disputes in the past.[64] As President Obama noted in his response when he distanced himself from the tension of the Boeing case, the NLRB is, after all, an "independent agency," and as such, should be somewhat distanced from the reins of political control. President Obama's words echo the spirit of what then-Senator John F. Kennedy said about the Board way back in 1954 when he noted that the NLRB "is not a policymaking branch of the administrative state which should be filled by one whose philosophy of labor is in keeping with

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[61] *See* U.S. House, Comm. on Oversight & Govt. Ref., Dec. 13, 2012, at 4, available at http://oversight.house.gov/report/president-obamas-pro-union-board-the-nlrbs-metamorphosis-from-independent-regulator-to-dysfunctional-union-advocate/.

[62] The NLRB is not the only independent agency that has been accused of political bias. *See, e.g.,* Floyd Norris, "Independent Agencies, Sometimes in Name Only," *New York Times,* August 8, 2013, at B1. Other recent examples abound. For instance, the regional branch of the IRS has been accused of politicization in its granting of tax exemptions.

[63] *See New Process Steel, L.P., v. NLRB*, No. 08-1457 (June 17, 2010), 130 S. Ct. 2635 (2010).

[64] Tensions between Congress and the NLRB were especially tense during the 1940s (Gross 1985).

the views of the political party in power."[65] Yet, at the same time, scholars, politicians and Board members themselves have chastised the Board for being such a "political animal" (Gross 1985, 97 (quoting Board member Guy Farmer); Taratoot 2013; Turner 2006; Cooke et al. 1995; Moe 1985; Cooke & Gautshi 1982; Roomkin 1981; DeLorme et al. 1981; Scher 1962). Former Board member Guy Farmer contended that while the White House did not necessarily dictate Board outcomes, he, as a Board member, felt pressure to implement "the philosophy that he thought his administration wanted him to project on the Board" (Gross 1995, 97; Gross 1974, 1981). The question remains, however: how much does partisan ideology impact the decisions of the Board in its unfair labor disputes? Is it fair for the Board's critics to accuse it of bias? Can Presidents indirectly control the Board through strategic use of appointments? Indeed, what is the exact nature of political control of so-called independent agencies?

This chapter seeks to address this issue by examining the unfair labor disputes of the NLRB during the presidencies of Bill Clinton and George W. Bush. Specifically, it looks at the impact that partisan ideology and panel composition have in whether the NLRB issues a decision for or against labor.[66] Using multivariate statistical analysis, I find that panel composition matters, with Democratic appointees being significantly more likely than Republican appointees to vote in favor of labor. The impact varies depending upon the time frame, with partisanship playing a greater role since the start of Clinton's second term. Moreover, a Democratic

[65] 100 Congressional Record S2004 (1954). Senator Kennedy continued: "It is not a tripartite body, to which representatives of labor and management should be appointed. Its members do not serve at the pleasure of the President, nor for a term of years concurrent with the Presidential tenure….[It] is instead a quasi-judicial agency, whose primary function is to interpret and apply the basic labor relations law of the land… Board members are, in effect judges."

[66] Consistent with the way it is used by others, I define ideology to mean voting with respect to either the Board member's partisan affiliation or to the professional background of said member (i.e., members hailing from labor backgrounds would be more liberal while members from management would be more conservative) (Turner 2009). Admittedly, ideology is a nebulous concept and there are different ways that it can be measured. Yung (2012), for instance, proposes a Partisanship and Independence Score that he says predicts when court of appeals justices will dissent, concur or reverse.

appointee sitting with other Democrats is much more likely to find in favor of the labor litigant than a Democratic appointee siting with two Republican appointees. I also find that the partisanship effect is unbalanced, meaning that the addition of a single Democrat to an otherwise Republican panel increases the propensity to vote in labor's favor more so than the addition of a Republican to an otherwise Democratic panel. Contrary to other studies, I also find that the ideologies of the President, Congress and the reviewing appellate courts appear to have no direct bearing on how the NLRB rules, indicating that the effect these other political actors may have on the Board is at most indirect. The partisan ideology of the Board – as well as the tone of the lower court ALJ decision – are the most important factors motivating the Board's decisions.

This chapter contributes to a greater understanding of the adjudicatory functions of administrative agencies. Administrative agencies, charged with making important decisions that impact millions of Americans every day, may be labeled "independent" with design features that are meant to ensure that they will not be as beholden to the whims of political actors. Federal administrative agencies handle a host of litigation disputes ranging from deciding Social Security benefit to adjudicating representation elections in labor disputes to deciding how much wounded veterans should receive in disability benefits. In this chapter, I first discuss the role that partisan ideology has played anecdotally in NLRB decisions and I discuss the few scholarly studies that have been done examining it. I then orient the study within the broader context of the study of panel effects in the appellate courts. In the third part, I set forth my empirical strategy to assess how partisan ideology affects vote choice on the NLRB during the Clinton and second Bush presidencies. I then present the multivariate results. I analyze the data in an attempt to assess how far the Board has strayed from its initial mission of being a dispassioned expert. Finally, I conclude with some thoughts on how the results fit in with the theoretical literature.

The NLRB- A Politicized Agency Motivated by Partisan Ideology?

Much ink has been spilled lambasting the NLRB for its supposed partisan decisionmaking (Gross 1995; Scher 1962).[67] Unlike federal judges who have life tenure, NLRB appointees are known as "in-and-outers" (Fisher 1987) and return to their prior labor or management employment upon completion of Board service.[68] In his authoritative history of the Board, labor historian James Gross (1974, 1981, 1995) contends that Board decisionmaking shifts depending upon who occupies the White House. Ronald Turner (2006) echoes this view, noting that while it may be the case that about 90% of NLRB outcomes are unanimous, ideology nonetheless plays a "persistent and, in many cases, a vote-predictive factor when the Board decides certain legal issues" (Turner 2006, 712). In his article, Turner detailed 13 substantive law issues in which ideology appeared to motivate Board outcomes. Indeed scholars are not the only ones who argue that ideology motivates outcomes. Board members echo this sentiment. In his recent memoir, former Board chairman William Gould (2000) recounts tails of the tensions between himself, Board members, House Republicans and the NLRB General Counsel. He criticized his fellow Board members, noting that some such as Republican Charles Cohen were obstructionist,[69] while others such as fellow Democrat John Truesdale "carefully [kept] a finger in the wind."[70]

[67] *See also* Fried (2002) ("The Board pretends to act like a court solemnly arriving at the correct interpretation of a legislative command, but in facts acts like politicians carrying out their electoral mandate to favor labor or to favor management.").

[68] As Joan Flynn (2000) notes, service on the Board, especially for management lawyers, is merely a short "hiatus" from an otherwise long career representing management.

[69] Gould (2000, 55) says that Cohen was labeled "Dr. No" by Board members due to his obstructionist behavior.

[70]Though Gould (2000, 55-56) said that Truesdale was a "consummate senior bureaucrat," he nevertheless opined that he owed his continued power on the Board to the fact that he was "carefully keeping a finger in the wind."

Scholars also argued that politicization continued during the Bush and Clinton presidencies. Fisk and Malamud (2009, 2021) contend that "[a]cross a range of doctrinal areas, it is apparent that Bush II labor policy made a decisive shift in favor of protecting managerial prerogatives and augmenting the ability of employers and employees to oppose unionization."[71] For instance, they cite data on the General Counsel's propensity to seek injunctive relief under section 10(j) of the statute. During the Bush presidency, the General Counsel made between 15-28 requests yearly, while during the Clinton presidency, the number of requests ballooned to between 43 to 104. Fisk & Malamud also take the Bush II Board to task for imposing higher legal standards of litigants pleading in favor of labor.[72]

These anecdotal stories fly in the face of what the NLRB's founders envisioned for the agency, a story detailed in Chapter 2. The NLRB's founders wanted it to be a "strictly nonpartisan body" that would cater to the public interest.[73] The Board's predecessor, the National Labor Board ("NLB"), had a tripartite structure with two members each from labor and industry chaired by a representative of the public interest (Gross 1995). The shift to make the new NLRB an adjudicatory body rather than an arbitral entity, however, resulted in a change in the structure of the body, with "a consensus that only the public interest should be

[71] According to Fisk & Malamud, these doctrinal areas include: limiting the availability of the voluntary recognition of unions, the scope of section 7 protections for mutual aid protections, and the use of interim injunctions under section 10(j) for violation of unfair labor practice laws. Fisk & Malamud compare the style of reasoning between the Bush and Clinton Boards on two issues: voluntary decisions about recognition or withdrawal of recognition of unions; and how the Board describes how it adopts older rules to new and changed circumstances.

[72] For instance, in *Raley's Supermarkets & Drug Centers*, 349 N.L.R.B. 26 (2007), the Board imposed a higher pleading requirement that the General Counsel had to meet in order to prove that the employer violated the labor laws.

[73] *See, e.g.*, Staff of Senate Comm. on Educ. And Labor, 74th Cong. Comparison of S. 2926 (73rd Cong.) and S. 1958 (74th Cong.) Section 3 (Comm. Print 1935), reprinted in 1 Leg. Hist. of the NLRA, at 1319-20; Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor, 73rd Cong. 340, 383, 889 (1934), reprinted in 1 LEG. HIST. OF THE NLRA, at 921, 927 (testimony of Nathan L. Miller, General Counsel, United States Steel Corporation).

represented."[74] The legislative history of the Board's governing act, the Wagner Act, confirms this interpretation: the Senate committee reporting the final version of the Act noted that "labor and management agree [that an] impartial board is better than a board with [members] representing respectively workers and employers."[75] Appointees in the first half century of the Board reflected this spirit, with appointees hailing largely from the halls of academia or government service (Gross 1974, 1981).[76]

While there have been some breaks in this pattern, notably during the Eisenhower[77] and Nixon[78] years, the Reagan Revolution cemented the trend that continues to this day of presidents drawing on the ideological divide to make appointments to the Board.[79] As AFL President Lane Kirkland said, "appointments to the NLRB have been of a character that represents the perversion of that board into an instrument of anti-union employers."[80] By the time of the first Bush presidency, the trend toward making ideological appointments to the Board had become so

[74] *See* A Bill to Promote Equality of Bargaining Power Between Employers and Employees, to Diminish the Causes of Labor Disputes, To Create a National Labor Board, and for Other Purposes, Hearings on S. 1958 before the Senate Comm. on Educ. and Labor, 74th Cong. 291 (1935), reprinted in 2 Legislative History of the NLRA, at 1617, 1677 (statement of Sen. Wagner).

[75] *See* Senate Comm. on Educ. & Labor, 74th Cong., Comparison of S. 2926 (73rd Cong.) and S. 1958 (74th Cong.), Section 3, 1 Legislative History of the NLRA, at 1320.

[76] For instance, the first and second chairs of the Board, Warren Madden and Harry Millis, came from academia.

[77] Eisenhower nominated Guy Farmer, a management lawyer, to the Board in 1953. He also nominated, Albert Beeson, an industrial relations director, to the Board. While the Farmer nomination sailed through the Senate without incident, labor mobilized in opposition to the Beeson nomination, though Beeson was still confirmed.

[78] Presidents Kennedy and Johnson stuck to the normal pattern of not nominating union or management representatives to the Board. In 1970, in a move opposed by the AFL, President Nixon broke with this pattern by appointing a management lawyer Edward Miller to the Board. Most of Nixon's and subsequently Ford's appointees came from management, while Carter did not appoint either union or management representatives to the Board.

[79]As Flynn (2000, 1384) notes, Reagan went "outside the mainstream labor relations community" to make ideological appointments to the Board. One of his appointees, for instance, John Van de Water, specialized in organizing campaigns to defeat unions. *See Reagan's NLRB Tips Toward Management*, BUS. WK., July 6, 1981, at 27-28 (noting that Van de Water "advises companies that want to resist union organizing campaigns").

[80] *See* House Subcommittee Plans Oversight Hearing on Change at Enforcement Division of NLRB, 1983 Daily Labor Report, (BNA) No. 110, at A-10 (June 7, 1983).

pronounced that the AFL no longer even bothered to oppose the nominations (Flynn 2000). Presidents Bush and Clinton continued to make ideological appointments to the Board, but each of them followed an unofficial norm of replacing departing union or management representatives with another like-minded union or management representative.[81] Indeed, according to some studies, Clinton appointed not only the three most pro-union advocates to the Board but the three most pro-management ones as well (Flynn 2000).

Changing norms in the appointment process contributed to this increased trend of polarization in the appointment process. In the period up to the late 1970s, NLRB appointment was almost seen as a "repeat game," with each side (Democrats and Republicans) not wanting to rock the boat so much for fear that down the road their favored candidates would not pass muster. Accordingly, politicians exercised restraint and had a norm of deference to the president's choice, with nominees largely been fairly moderate or at least no more in favor of management or labor than their government counterparts. The Reagan Revolution signaled changes in the larger political landscape that played itself out as well with respect to the NLRB appointment process. Reagan's appointees overall to all federal agencies were simply more ideological than the appointments made by past presidents (Flynn 2000). But more importantly, the previous norm of deference broke down, with both sides now willing to wage campaigns to preclude the confirmation of any candidate deeded too liberal or too conservative.[82] The process became even more contentious by the Clinton years, with the Senate either refusing to take up nominations or else informally vetoing such nominations before they are even officially

[81] For instance, Bush attempted to appoint a union representative to the Board. Clinton became the first Democratic president to appoint management to the Board, filling every Republican seat with a management lawyer: Charles Cohen, Peter Hurtgen and J. Robert Brame.

[82] Flynn (2000) also notes that labor was angered by the failure to pass labor law reform during the Carter administration. This prompted labor to insist that Carter violate appointment norms to appoint a more ideological General Counsel.

announced. Moreover, "package" nominations increasingly became the norm.[83] As some scholars have argued, packaging of nominees contributes to nominees being more partisan. This shift –from a presidential-directed process with deference being the norm – to one where both Congress and the President compete over nominations exacerbated the partisan turn of the nominations – especially at the NLRB. Rather than agreeing on nominations (or at least not directly opposing them), each side picks "slots" to fill with their chosen partisans.

Scholarly Studies of Politicization at the NLRB

Still, while there has been much anecdotal evidence of the NLRB's politicization, there have only been a few scholarly studies of the NLRB's adjudicatory decisions, with scholars generally finding that the NLRB's output is influenced by the party of the appointing president. Prior to 1979, Board member voting was very closely aligned with the party of the appointing President, with the most pro-industry voters being Republican and the most pro-labor voters being Democratic, with one exception.[84] In their study spanning the Board's unfair labor practice decisions involving "novel questions" or that set "important precedents" from 1955-1979,[85] Delorme and Wood (1982) found that about three-quarters of those with the most pro-industry voting records came from management backgrounds.[86] Interestingly, however, the most

[83] Clinton made two package nominations to the Board: in 1993-1994 at the onset of his presidency and 1997. *See Senate Confirms Gould Nomination to NLRB; Feinstein, Cohen and Browning Also Approved*, 1994 Daily Labor Report, (BNA) No. 41, at A-11 (Mar. 3, 1994); Senate Confirms Four Clinton Nominees Giving Labor Board Five-Member Complement, 1997 Daily Labor Report, (BNA) No. 218, at A-1 (Nov. 12, 1997). This trend toward package appointments to the Board has also occurred for appointments to other federal agencies such as the SEC and FCC.

[84] Board member John Fanning, a Democrat first appointed by Eisenhower around the same time Eisenhower was seeking to appoint Earl Warren to the Supreme Court, was one of the most liberal Board members.

[85] In its Annual reports, the NLRB sets forth a list of such decisions.

[86] Delorme & Wood (1982) also found that the party affiliation of the appointing Administration impacted votes and that economic factors such as a higher unemployment rate led to more pro-labor decisions under the Eisenhower Administration and less pro-labor decisions under the Nixon Administration.

pro-industry Board member at the time was a careerist who had no clear ties to either industry or labor, leading the authors to conclude that Republican-appointed industry lawyers were not more predictably pro-industry than Democratic-appointed union lawyers being skewed pro-union. Another study, however, covering a much later time period 1985 to 2000, reached a different conclusion concerning Board votes on so-called "disputed" cases where at least one Board member filed a dissent.[87] They found that the six Board members hailing from industry had the most pro-industry records while the three Board members who represented labor in the past had the most pro-union voting records. These patterns persisted even when controlling for the political party of the appointing president. The voting patterns were clearly one-sided. For instance, Republicans Peter Hurtgen and J. Robert Brames voted in favor of the employer 97% and 90% of the time, respectively; likewise, Democrat Margaret Browning voted in favor of labor 98% of the time.[88] Further, voting patterns of some members appeared to grow more partisan over time. For instance, Democrat Sarah Fox voted 173-0 in favor of labor in cases from 1999 and 2000. Flynn, who analyzed both studies, reconciled the differing results by arguing that while Board members prior to 1980 often favored one side, they were no more or less one-sided in voting than Board members hailing from government or neutral backgrounds.[89] This all changed starting in 1980s, with Board members voting in a much more one-sided direction than in the past.

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[87] *See The Voting Records of the NLRB*, May 1999 Employment Law Alert (Nixon Hargrave Devans & Doyle LLP), April. 1998) (hereinafter "Employment Law Alert").

[88] This is an example that could be misleading, however. As noted in Chapter 3, oftentimes members dissent when they disagree with *part* of a ruling. Indeed, in most cases, member Hurtgen often would rule for the pro labor litigant but he would dissent in part because there were specific allegations that he would find for the employer. It is likely that statistics like the ones quoted above allocate any such decision as wholly pro industry.

[89] One could question, for instance, the differing methodologies used by each study. The Employment Law report, for example, filters out unanimous cases. Flynn (2000), however, examines that issue and concludes that the differences are indeed real: Board members from 1959-1979 were less partisan than those serving after 1985.

In another study, Cooke and Grautshi (1982) expanded the Delorme and Wood analysis studying the period 1954-1977 by looking at the role that Board member characteristics (i.e., age, employment by management prior to appointment, urban/rural) and public support (i.e., % of Democrats in the Senate) played in impacting decisionmaking, finding that neither of these factors impacted NLRB votes; rather, to the contrary, Cooke and Grautshi found that the nature of the appointment (party affiliation of the appointing President and of the Board member) and whether the case was filed by a union or an employer to be the only factors that impacted NLRB decisions. In a later analysis, Cooke and Delorme (1995) differentiated between "important and complex" decisions as compared to "less important and simpler decision." For that analysis they found that the political inclinations of the appointing president and Board member mattered for salient cases only. Moreover, they also found that higher unemployment rates led to more pro-employer votes, and that NLRB members are influenced by members of the ideological composition of Congress.

Moe (1985) found similar results in his examination of data. He, however, expanded prior models to account for case mix and he tested the impact that courts have in the process. Moe used as his dependent variable the proportion of pro labor decisions made by the Board each quarter between 1948 and 1979. He found the Board to be responsive to macroeconomic pressure, such as changes in unemployment and inflation as well as to changes in presidential and congressional influence. With respect to courts, he discovered that the more pro-labor decisions a court issued, the more likely the NLRB made pro labor decisions.

Several more recent analysis have built on the work of Moe, Delorme and Wood and Cooke and Grautshi by incorporating more variables in the analysis. Taratoot (2013) discovered that once one accounts for the ALJ decision, the impact of factors previously found to be

significant – such as political factors – largely disappeared. He found that the ALJ decisions played the most important predictive role in determining NLRB case outcomes; he also found that the Board's ideology impacts results with a "moderate" Board generating a pro-industry decision 2.9% of the time, a split decision 44.3% of the time, and a pro labor decision 52.8% of the time. Taratoot also found that appellate court ideology impacted NLRB decisionmaking, hypothesizing that the Board is forward thinking in making its decisions in line with what the appellate court might rule. Unlike previous studies, however, Taratoot contended that neither the President nor Congress influence outcomes.

However, not all scholars studying NLRB decisions have found that partisanship or ideology impacts decisionmaking. In a qualitative analysis of NLRB cases concerning inherently destructive conduct, Paul Secunda (2004) concluded that the institutional collegiality permeated Board decisionmaking, at least with respect to decisions concerning that specific topic.[90] In his study of 140 cases from 1967 to 2004, he found that Board members of one political party were no more or less likely to find a violation than appointees from the opposing party. Secunda, however, found that Democratic-majority Boards were more likely to find a 8(a)(3) violation than Republican boards, with Democratic boards finding violations in 85% of cases while Republican boards finding violations in just 54%. Nonetheless, he concluded that, at least with respect to the limited doctrinal area studied, the NLRB decides cases "solely on their legal merits and with the sole goal of getting the law right."

Limitations of Scholarly Studies

Still, many of the studies that have been done on the administrative state, especially those studying the NLRB, have been limited in focus and time. Rather than focusing on how the

[90] Secunda (2004) does a doctrinal analysis of 140 cases he found where the issue of inherently destructive conduct came before the Board from June 1967 to February 2004.

Board rules, many of them focus more on the propensity of labor to prevail. Further, only a handful of the studies are recent, with most studying the NLRB prior to the ideological turn of the Reagan years. Prior studies also fail to account for the important legal differences between cases. Except for the fact that some scholars separate out cases emanating from labor and those coming from industry, no analysis makes any attempt to separate out cases according to case type or legal issue. There are many different violations under the NLRB, and the Board has less discretion in some statutory manners than others. For instance, employers may be accused of threatening employees if they were to join a union– a violation of section 8(a)(1). Section 8(a)(1) cases are largely decided on whether the employer conduct impermissibly interfered with, coerced, or restrained employees when they exercised their rights under section 7 of the Act. In these cases, the Board generally will weigh employer's economic interests with the interests of the plaintiff, such as with respect to their right to organize. Discriminatory intent is irrelevant to finding a violation.[91] The underlying legal determination largely rests on credibility, and the Board has virtually no discretion to upset the credibility judgments of the lower court administrative law judge ("ALJ"). By contrast, discriminatory intent is key to finding a violation of section 8(a)(3).[92] In section 8(a)(3) cases, the NLRB must judge whether the employer's actions are motivated by an "anti-union intent" that has the foreseeable effect of discouraging joining a labor union.[93] As another example, employers charged with a violation of

[91] *See Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) ("A violation of 8(a)(1) alone… presupposes an act which is unlawful even absent a discriminatory motive.").

[92] 29 U.S.C. §158(a)(3).

[93] *See Radio Officers' Union v. NLRB*, 347 NLRB 17, 42-43 (1954) ("The relevance of the motivation of the employer in such discrimination has been consistently recognized under both 8(a)(3) and its predecessor."). Such anti-union bias can be shown in two ways: specific evidence of unlawful intent or inferring intent from the conduct. *See Radio Officers'*, 347 U.S. at 44-45 ("Specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of 8(a)(3)… Both the Board and the courts have recognized the proof of certain types of discrimination satisfies the intent requirement.").

section 8(a)(5) which makes it illegal for an employer to refuse to bargain in good faith about wages may have more legal wiggle room to advance their case. What constitutes "good faith" can often be a subjective decision, and the weighing accorded with such an analysis may give the Board more discretion to interject personal feelings. By lumping together all cases without making any differentiation based on case type or legal issue, it is virtually impossible to discern the true motivator of politicization. Another important distinction is that virtually all preexisting studies ignore split decisions, which constitute about a third of all cases and which are probably the cases that are the hardest to decide. Many researchers just cut out split decisions from their analysis (DeLorme & Wood 1981; Moe 1985), while some more recent scholars include split decisions, but do so in only a limited way (Cooke et al. 1995; Taratoot 2013).

Moreover, nearly all analysis completely ignores the role of other important Board actors. With the exception of Taratoot (2013) and Moe (1985), no analysis accounts for the fact that the ALJ determination is largely binding and that in 80% of cases the Board merely reaffirms the ALJ decision. As noted above, in many cases, even if the Board member wanted to, he simply does not have the legal ability to influence the tone of the agency cases because the member cannot make law on issues that are outside his discretion to rule on. For instance, even if a pro industry member wanted more cases to go in favor of industry, he is constrained in bringing such a plan to fruition because the cases he is presented with may be ones that largely rest on credibility determinations, something that the Board largely lacks power to contest. Thus, failing to account for the missing variables of the limited range of discretion that the Board operate under is a major flaw in previous studies.

The NLRB Today: Does Partisan Ideology Drive Vote Choice?

Empirical Strategy

Despite anecdotal claims of the NLRB's supposed politicization, the empirical question remains to be answered: what impact do these ideological appointments have in affecting the actual decision of the agency? That is, are the decisions of independent agencies motivated by the sort of dispassioned expertise that is suppose to differentiate independent agencies from other forums? Or do the decisions of independent agencies shift according to short-term political whims, with political ideology animating decisionmaking? In other words, all else constant, would the same case be decided differently if there is a Democrat on the panel instead of a Republican? If that indeed is the case, such a pattern of decisionmaking could call into question the very expertise and stability of adjudications being done at so-called independent agencies (Turner 2006). It also raises the specter of whether agencies are "captured" by short-term partisan interests (Barkow 2009).

The study is designed to test the impact that partisan ideology has in impacting the case outcomes at the NLRB and to determine whether different partisan configurations of the panel impacts the tendency of the NLRB to vote for or against labor. It also seeks to test the impact that other political actors have on Board decisionmaking. In this section, I set forth the empirical strategy and discuss the variables used. I proceed with my empirical analysis to test the impact that partisan ideology and panel composition plays in impacting vote choice on NLRB unfair labor practice decisions.

Panel Effects on Multimember Courts

Studies of the Supreme Court often study the impact that judicial ideology has in impacting votes on particular issues before the Supreme Court (Segal & Speath 1993). More

recently, in a welcome development, scholars have expanded this line of inquiry to study decisionmaking at the courts of appeals and other lower federal courts, with many finding that ideology pervades judicial decisionmaking on certain issues (Sunstein et al. 2004; Yung 2009; Cox and Miles 2008; Miles & Sunstein 2006, 2008). As such they theorize that Democrats may favor a liberal outcome while Republicans would more often vote in favor of a conservative outcome (Revesz 1997; see also Cross 2007). Some scholars and judges have raised concerns about ascribing so much importance to ideology, arguing instead that formalist interpretations of law or institutional goals, such as career advancement, motivate decisions more so than ideology (Edwards 1998; *see also* Edwards & Livermore 2009; Edwards 1985; Edwards 2003; Posner 2008). Nonetheless, the number of empirical studies of judicial ideology has skyrocketed over the last decade (Chemerinsky et al. 2009; Cross & Sundquist2009; Knight 2009; Jacobi & Sag 2009; Fischmann & Law 2009).

Scholars theorize that panel composition impacts judicial outcome, with many finding that the partisan affiliation of one's colleagues impacts vote choice and possibly mitigates (or enhances) the impact that ideology alone has. In two seminal works, Revesz (1997) (studying the D.C. Circuit) and Sunstein et al. (2006) (studying federal circuit courts on a host of issues), found that the propensity for a member of a three-judge panel to cast a liberal vote increases with every Democratic appointee on the bench, and likewise decreases with every Republican appointee. Indeed, Revesz notes that "while individual voting and panel composition both have important effects on a judge's vote, the ideology of one's colleagues is a better predictor of one's vote than one's own ideology." The differences can be striking: Sunstein et al (2006) found that in some areas of law, an all-Democratic panel issued a liberal ruling 62% of the time while an all-Republican panel did so only 36% of the time. While ideological voting does not occur on all

issue areas,[94] Sunstein et al nevertheless found that who one's co-panelists are influences vote choice as much or even more so than one's own ideology. They find evidence of ideological voting, dampening and amplification on cases dealing with campaign finance, affirmative action, sex discrimination, sexual harassment, piercing the corporate veil, racial discrimination, disability discrimination, Contracts Clause violations and review of environmental regulation.

Others scholars have found similar results in diverse areas of law: asylum cases (Fischmann 2011),[95] criminal, immigration and civil rights cases (Berjado 2013)[96] and Establishment Clause (Sisk & Heise 2012) cases in the federal courts of appeals, among other issues.[97] These so-called "panel effects" apply not just to partisanship but to gender, race and religion as well, with judges deciding a case differently depending on the gender and race of his or her co-panelists (Boyd et al. 209; Farhang & Wawro 2004; Pinello 2003; Sisk et al. 1998). Cox and Miles (2008), for instance, found that African-American judges sitting with African-American co-panelists were twice as likely as white judges to find a violation of section 2 of the Voting Rights Act.[98] Pauline Kim (2009) and Farhang and Wawro (2004) found evidence of panel effects in federal court of appeals cases dealing with sex discrimination. However, it may

[94] Sunstein et al failed to find ideological voting on the following issues: criminal appeals, takings, challenges to punitive damages, standing to sue and commerce clause challenges to constitutional enactments. They also found that ideological amplification and dampening are not present in cases dealing with abortion or capital punishment.

[95] Fischmann (2011) found that Democratic appointees grant relief 35% of the time to plaintiffs in asylum cases when copanelists are Democrats compared to just 15% when the judge shares the bench with two Republicans. Likewise, Republican appointees favored the asylum plaintiff 20% sitting with two Democrats but just 6% of the time when the judge sits with copartisans.

[96] Carlos Berdejo (2013) found that plaintiffs in criminal and immigration cases prevail less when Democrats are on the panel, but that the chance of success in civil rights and prisoner petition cases increases when more Democrats are on the panel.

[97] Gregory C. Sisk & Michael Heise (2012) found that Democratic judges uphold Establishment Clause challenges 57% of the time, while Republican judges do so only 25%, resulting in a 2.5 times greater chance of prevailing before a Democratic judge.

[98] Similarly, they found that Democratic appointees were 15% more likely than Republican appointees to find a violation.

not entirely be the case that party matters in all cases. Some studies have found no evidence of ideological voting. For instance, Jonathan Remy Nash and Rafael Pardo (2012) found that only non-ideological factors motivated deicisonmaking in bankruptcy cases in the court of appeals. Scholars have also found no evidence of panel effects in federal preemption cases (Joondepth 2011). In particular, panel effects may be more absent in more legalistic type of cases.

Sunstein et al. (2006) set forth theories of ideological dampening and ideological amplification. Ideological dampening occurs when the propensity for a judge to favor his own ideology is "dampened" if his co-panelists come from the opposing party.[99] This may be because judges are persuaded by opposing viewpoints or it could be a byproduct of collegiality. Judges may suppress doubts in order to go along with other member of the panel,[100] or alternatively, the views of co-panelists may play a role in moderating the tone of the majority's legal reasoning. Judges may also not want to spend the time to write a dissent (Cross & Tiller 1998).[101] "Dissent aversion" may also be at work, with one judge having a particularly strong opinion, and at least one of the other two judges goes along with the first judge to "avoid creating ill will" (Epstein et al. 2011, 108). They may also engage in logrolling by trading a vote on one issue in exchange for a favorable vote on another (Cox & Miles 2008; Farhang & Wawro 2004)). Virginia Hettinger, Stefanie Lindquist and Wendy Martinek (2006) argue that judges may dissent to signal to the upper court that the majority decision contradicts settled law or to

[99] Indeed, in some areas of law, Sunstein et al found such extreme cases of ideological dampening (which they call "leveling effects") such that Democratic judges, sitting with two Republican judges, are as likely to vote in a conservative direction as Republican judges sitting with two Democratic colleagues. In fact, sometimes, a minority Democrat will be even more conservative than a minority Republican.

[100] Sunstein et al. refers to this phenomenon as the "collegial concurrence" where a judge would rather just agree to the majority opinion rather than waste the time to dissent.

[101] For instance, Cross and Tiller (1998) argue that the presence of a minority viewpoint could alter the content of the opinion even if there is not a formal dissent.

invite review by an upper body, whether it be the *en banc* circuit court or the Supreme Court. Judges can also influence their colleagues through a whistleblower effect. Whistleblowers can help correct errors by drawing the panel's attention to correct outcomes. Cross and Tiller (1998) argue that courts are more likely to comply with doctrine when panels are divided and that a judge is more likely to dissent if the judge is aligned ideologically with the circuit majority.

Likewise, a judge's ideological tendency may be "amplified" if he sits with co-partisans. Sunstein et al (2006, 71) notes that this occurs because "[d]eliberating groups of like-minded people tend to go to extremes." The pool of arguments employed by a homogenous group will likely be very different than those employed by a mixed group. For instance, in an all-Democratic panel, panelists will offer arguments in favor of the liberal outcomes while on a mixed panel, contrasting arguments that favor a more conservative outcome may be brought up by members from the other party. Judges, for instance, may be exposed to and respond to the most extreme argument of the group. Judges sitting with their co-partisans may also have greater confidence that their viewpoints are correct.

While there has been a robust literature on the study of panel effects on the courts of appeals there has been virtually no empirical study of how panel voting works in any administrative agency. Given the volume of administrative agencies that decide cases using a panel format, analyzing how panel effects apply in an administrative context is important to understanding how administrative agencies work and how they use their delegated power. It is to this task that we now turn using the NLRB as a case study.

Data

Dependent Variable

The key independent variable of interest is the Board outcome. As noted in Chapter 3, I coded the Board's decision in a number of alternative ways. In one coding style, I read and

analyzed each Board decision and coded the case as "1" if the NLRB decided the case in whole or in part in favor of labor. In an alternative coding, I looked as well at what party challenged the ALJ's ruling in order to weigh whether the decision should be coded a "1" or a "0." For instance, suppose there is a case where the ALJ decides in part in favor of labor. The labor party, disappointed that the ALJ did not decide wholly in his favor, decides to file exceptions. The Board finds those exceptions to be without merit. Under the first coding style, the decision would be coded as pro labor because by affirming the ALJ decision in part, the case upheld the pro labor claims in part. Under the second coding style, however, a case such as this would be coded as pro industry because the labor litigant who filed exceptions before the Board lost. In other words, the Board found against the labor litigant, and in turn, the tone of its ruling had a pro industry beat because it was *against labor*. Most cases in the dataset are clear cut; the ALJ decides a case wholly in favor of labor and the Board upholds, oftentimes issuing merely a summary opinion stating that it does not have the power to review credibility determinations of the ALJ. However, there are a handful of cases that present the situation posed above, so I do the analysis two ways, one using the first coding style that favors labor and another using a second coding style that looks more carefully at the Board decision to see 1) who exactly files exceptions to the ALJ's ruling; and 2) whether the Board denies or grants the relief asked for by the exceptions in whole or in part.

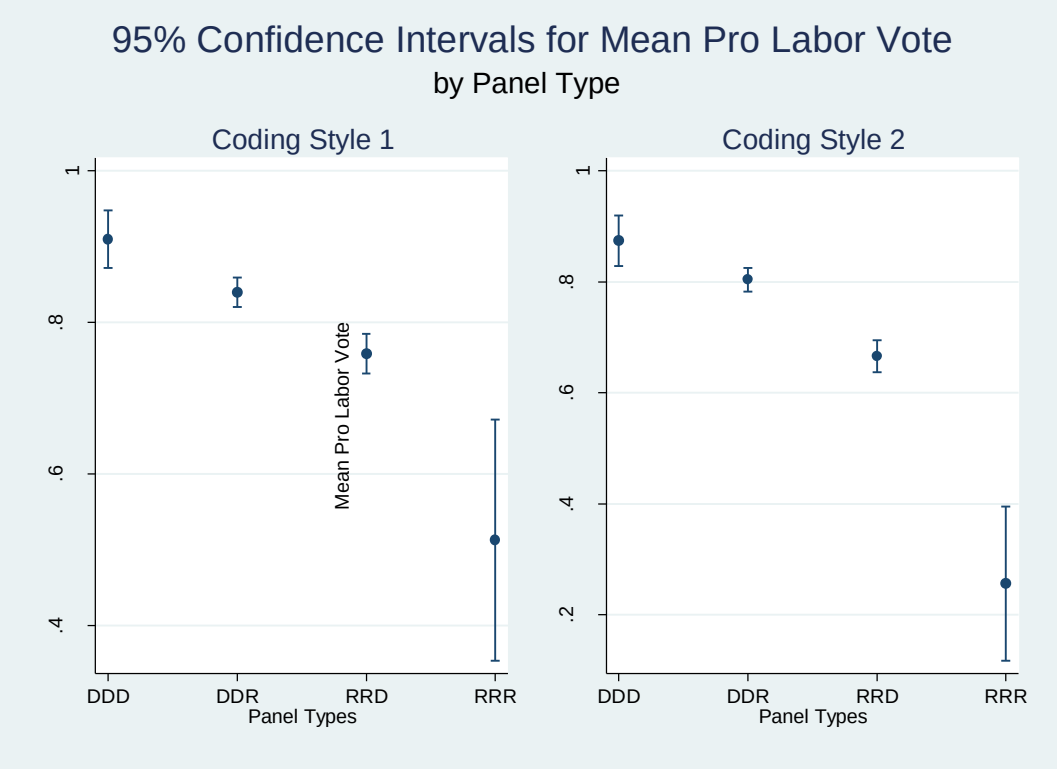
As another alternative dependent variable (which I explore later with an alternative statistical analysis), I also look at the cases broken down more fine tuned as to whether they lean labor or industry. Many cases in the dataset are split. For instance, in a hypothetical case the charging party could potentially bring charges under various sections of the NLRA. Most typically, many labor litigants allege joint violations of section 8(a)(1) and section 8(a)(3) or

section 8(a)(5). The ALJ could find in favor of the litigant on the section 8(a)(1) charge but for the industry litigant for the section 8(a)(5) charge. Likewise, the Board may find the opposite; it could find the industry's exceptions persuasive and find that there is no 8(a)(1) violation but that there is an 8(a)(5) violation. As such, because there is so much variation that can go into the cases, I use an alternative dependent variable where I try to allocate each case as much as possible to one of four possible categories: pro industry, lean industry, lean labor and pro labor. I allocate cases to each category using the two distinct coding schemes of Coding Style 1 and Coding Style 2 where I look at which parties files exceptions to the ALJ action. Coding of the cases is necessarily complicated and for many cases there are delicate judgment calls one must make in deciding what category the case should be in. Such a selection is not exact and is fraught with complications. As Tonja Jacobi and Matthaw Sag (2009, 7) argue, "the last four decades of empirical legal scholarship have proceeded without a sophisticated objective measure of case outcomes." Nonetheless, nearly all of the prior empirical work on the NLRB blindly allocates NLRB cases to the pro labor pile regardless of what party challenges the case or whether the case is split or not. With rare exception, no one has even really looked at the differences between split and nonsplit cases, partly because the coding of so many cases is so laborious. Moreover, scholars disagree on how exactly to code for legal doctrine. As Derek Linkous and Emerson Tiller (2009, 90-91) note, "Doctrine…is hard to code for, and undoubtedly, there may be issues with training to transform a legal principle, standard or rule into a codeable variable." This study is at least a modest attempt to try to incorporate these differences into the analysis.

General Overall Findings

At first glance, looking at the overall data, additional Democrats on a panel increases the chance the NLRB will rule in favor of labor. Quite clearly, at least on a superficial level before additional "controls" are added in, the partisan composition of a panel is strongly correlated with case outcomes. But whether panel decisions actually differ depending on the panel depends in part on what Coding Style one uses. For purposes of the first graph, Figure 9, I first used Coding Style 1 reflecting the propensity of the panel to rule in favor of labor. Overall, judges sitting on all-Democratic panels vote 86% in favor of labor, while Republican judges sitting with other Republicans vote in favor of labor only 50% of the time. The propensity for the Board to rule in favor of labor decreases as more Republicans are added to the panel; when one Republican replaces a Democrat, the Board rules in favor of labor 78% of the time – an 8% decline. Likewise, if two Republicans sit on a panel, the rate goes down even lower to 69%. The trends were similar when I switched to using Coding Style 2, where I allocated more decisions to the pro industry side after reading the case facts. Most notable is the difference with all Republican panels. Whereas RRD panels voted in favor of labor about 76% of the time, the use of Coding Style 2 whereby one looks more closely at who prevailed, results in RRD panels voting pro labor 66% of the time. Likewise, whereas all Republican panels vote in favor of labor in whole or in part 51% of the time, they vote in a pro labor direction only 25% of the time using the alternative coding style. These results underscore how important legal considerations are in understanding how courts make decisions. Most scholars allocate scores to the pro liberal side if most or part of the decisions rests in a liberal direction. It is likely, however, that the panel effects they find using such a method could somewhat underestimate panel effects, especially on Republican panels.

Figure 9



We see a similar pattern when we restrict the analysis to only cases filed by labor or cases that allege only certain violations of the NLRA. Looking only at cases filed by labor, all-Democratic panels rule in favor of labor 88% of the time, while majority Democratic-mixed panels rule in favor 82%. The presence of two Republicans rather than one changes the figure to 74%. The big jump, however, occurs when there get to be three Republicans on the panel; although the situation is quite rare during the time frame under study, it nonetheless was the case that all-Republican panels voted in favor of labor only 50% in cases alleging employer violations. Figure 10 demonstrate a similar trend when we restrict the analysis just to cases alleging certain violations of the statute using Coding Style 1. We see similar results restricting the analysis just to cases filed against unions as well (Figure 11), though because the sample size is fairly small the error bars are within the margin of error. The panel effects seems especially

strong in section 8(a)(1) cases with RRR panels ruling in favor of labor at a lesser rate under that section than some other sections of the statute. Section 8(a)(5) cases also show panel effects, especially with respect to RRR panels, but some of the results are within the margin of error.

Figure 10

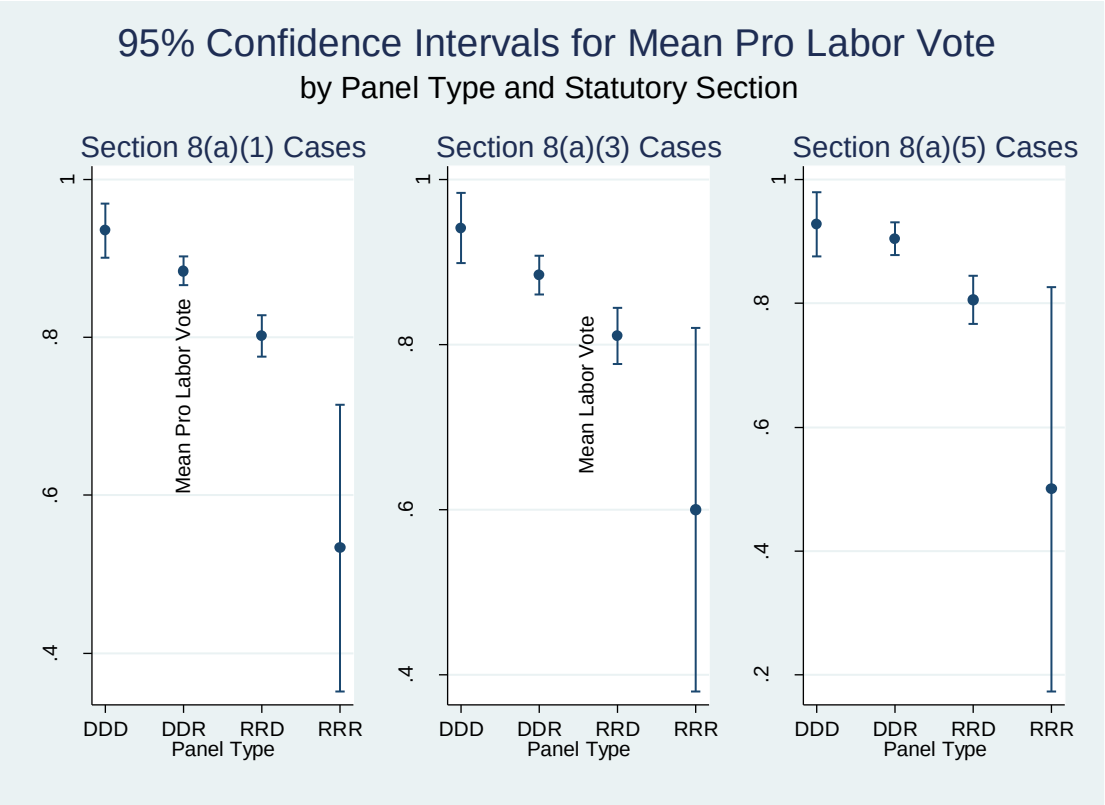
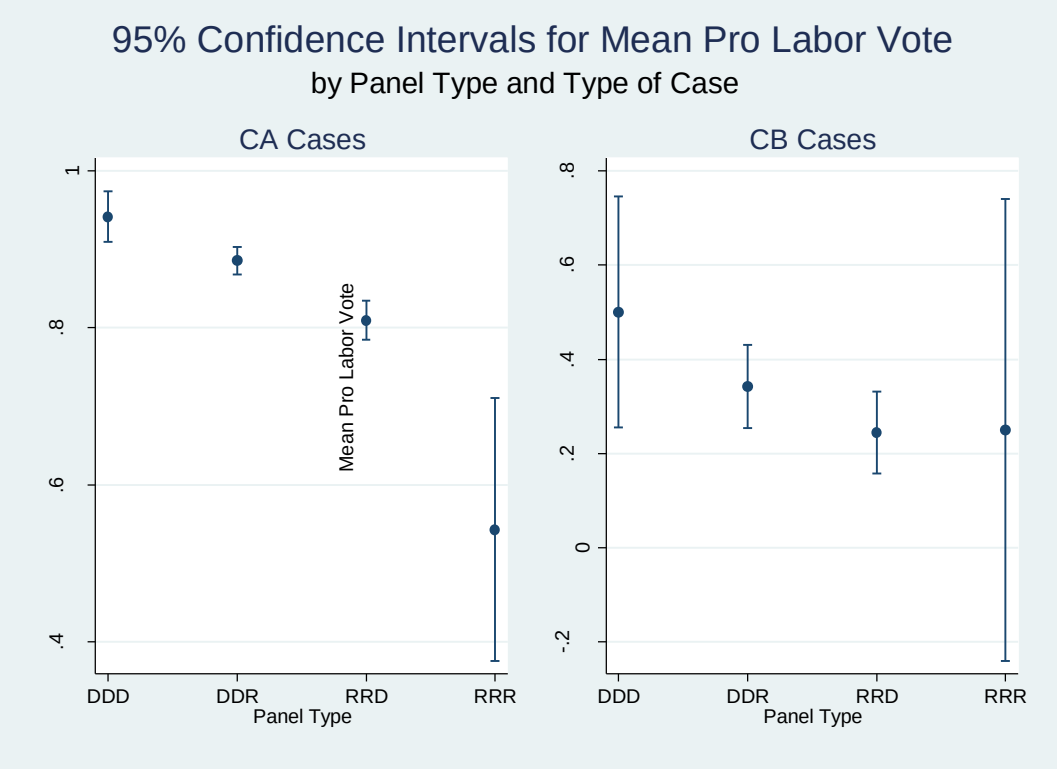


Figure 11

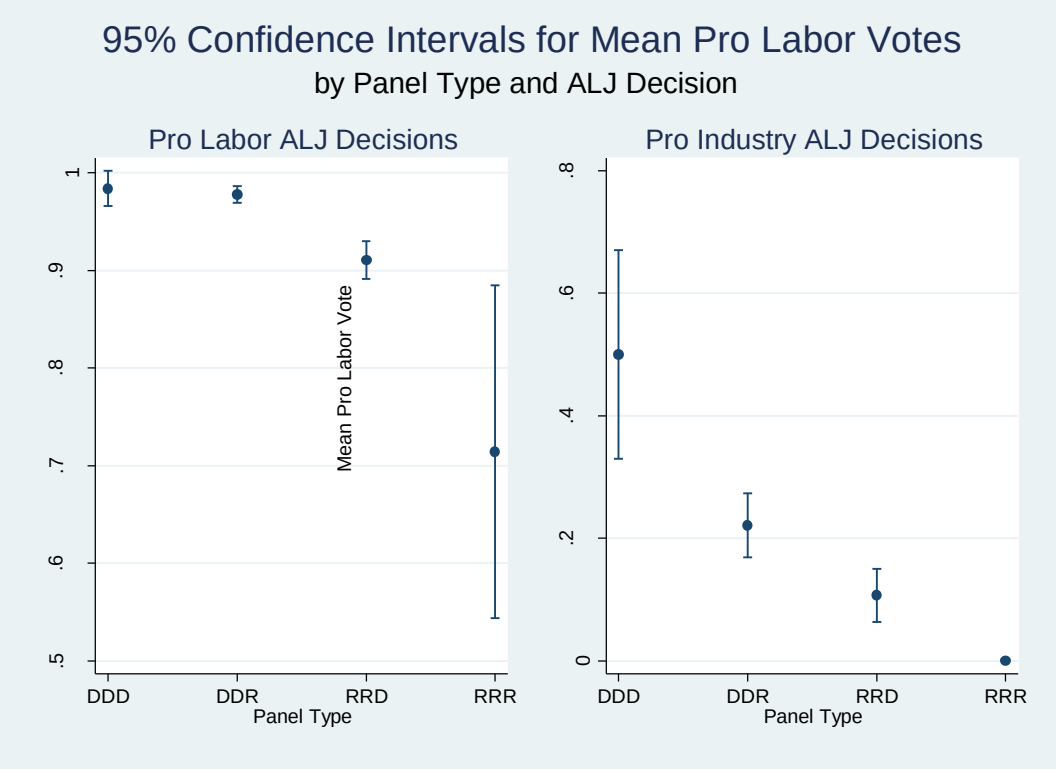


These results echo what others have found concerning asymmetric whistleblowers. Here, across a range of issues, the same pattern appears to emerge with an increased tendency to vote in favor of labor when there are more Democrats on the panel. Yet, the effect of adding one Democrat to the panel is not the same as the effect of adding one Republican. While the presence of a lone Republican on a majority Democrat panel results in a decreased tendency to favor labor, the absolute difference is less than in cases when there is a lone Democrat added to a Republican panel. This suggests that the presence of a lone Democrat on an otherwise majority Republican panel may have an impact in mediating the results somewhat toward labor. Although the differences between a DDD panel and a DDR panel are statistically significant in a few cases, the absolute magnitude of the difference generally is less than 10 points. Interestingly, other scholars studying panel effects in the courts of appeals have found just the

opposite: that is, they found DDD panels behave more differently from DDR panels than RRR panels from RRD panels (Berjjado 2013).

It is also important to consider what may be one of the most important factors in determining how the Board will rule: the ALJ decision itself. Figure 12 presents the data broken down by the ideological tone of the ALJ decision for CA cases only concerning labor practices of employers. DDD and DDR panels almost unanimously vote to uphold the ALJ decision if the ALJ decides in favor of labor. By contrast, when the ALJ decides in favor of industry, DDD panels only vote to affirm 47% of the time. Mixed panels, however, are more likely to uphold a conservative ALJ decision in favor of industry than a DDD panel. Moreover, like all-Democratic panels, RRR panels exhibit partisan behavior; they unanimously affirm cases that are in line with their ideological tendencies, but they only affirm 70% of liberal pro labor decisions emanating from the ALJ. The pattern is the same but the numbers are more extreme when using Coding Style 2. Using Coding Style 2, all Republican panels affirm a pro labor ALJ decision only 36% of the time. Likewise, majority Republican panels affirm 79%. If the ALJ outcome is conservative, all Republican panels always agree to affirm, whereas RRD panels affirm only 86% of the time. The great difference between RRD and RRR panels in this regard underscores how adding a single Democrat to a panel has in influencing case outcomes.

Figure 12



Furthermore, panel effects appear to be especially prevalent when looking at the data by validation rates as opposed to just whether the Board voted for or against labor (Figures 13, 14). Miles and Sunstein (2006) compared validation rates with rates of liberal voting in a study of appellate court review of NLRB and EPA decisions and found panel effects to be more prevalent on rates of liberal voting than for validation. Here, using Coding Style 2, we see an interesting pattern whereby DDR panels evidence greater validation rates than DDD panels looking only at the majority CA cases. Moreover, the panel effects observed do not appear to be as extreme as the panel effects observed when looking only at the rate of liberal voting. The data gets more interesting when broken down by the ALJ decision. Of the times when the Board does a complete reversal of the ALJ decision in favor of industry, 69% of the time the panel is a RRD panel; likewise, where the Board does a complete reversal of a conservative ALJ decision to rule

in favor of labor, 69% of the time the panel is a DDR panel. Overall, majority Republican panels have a higher rate of reversal of liberal ALJ decisions, as nearly 34% and 15%, respectively of RRR and RRD panels are reversals in a conservative direction, whereas of all the cases heard by DDD and DDR panels, they reverse in favor of industry about 5% of the time each. The pattern is not as stark for reversals of conservative ALJ decisions. About 16% and 8% of DDD and DDR decisions, respectively, represent liberal reversals of conservative ALJ decisions. By contrast, only 5% of RRD panels ever reverse in a liberal direction and no RRR panels reverse a conservative ALJ decision in whole or in part.

Figure 13

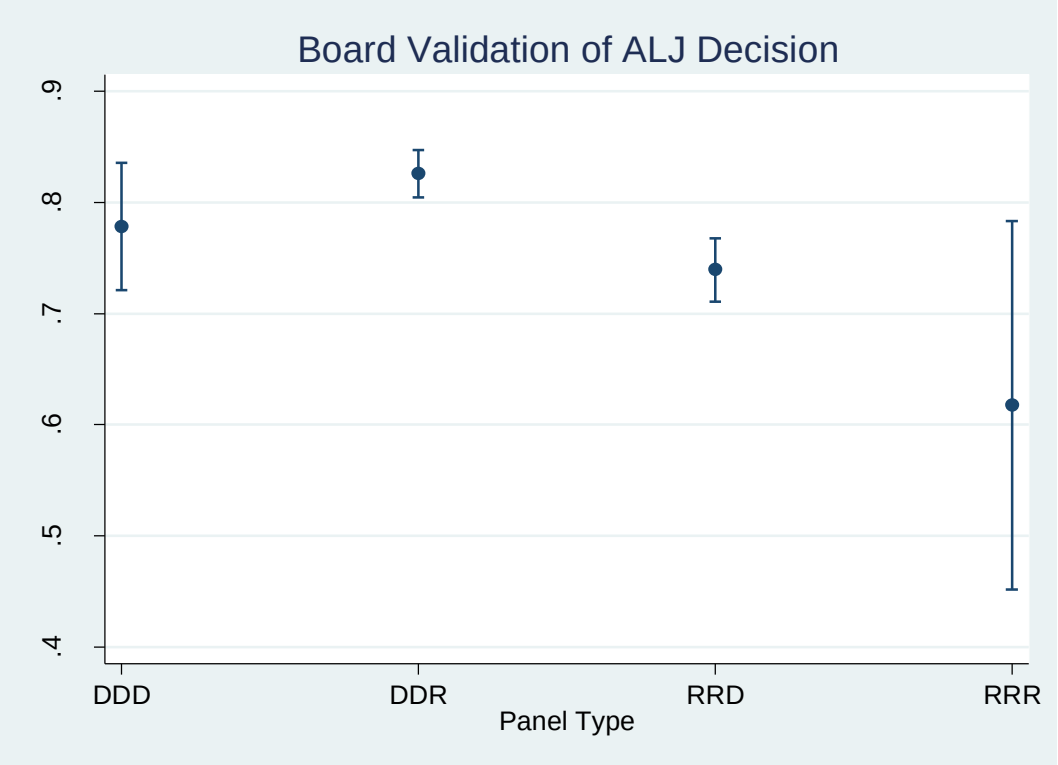
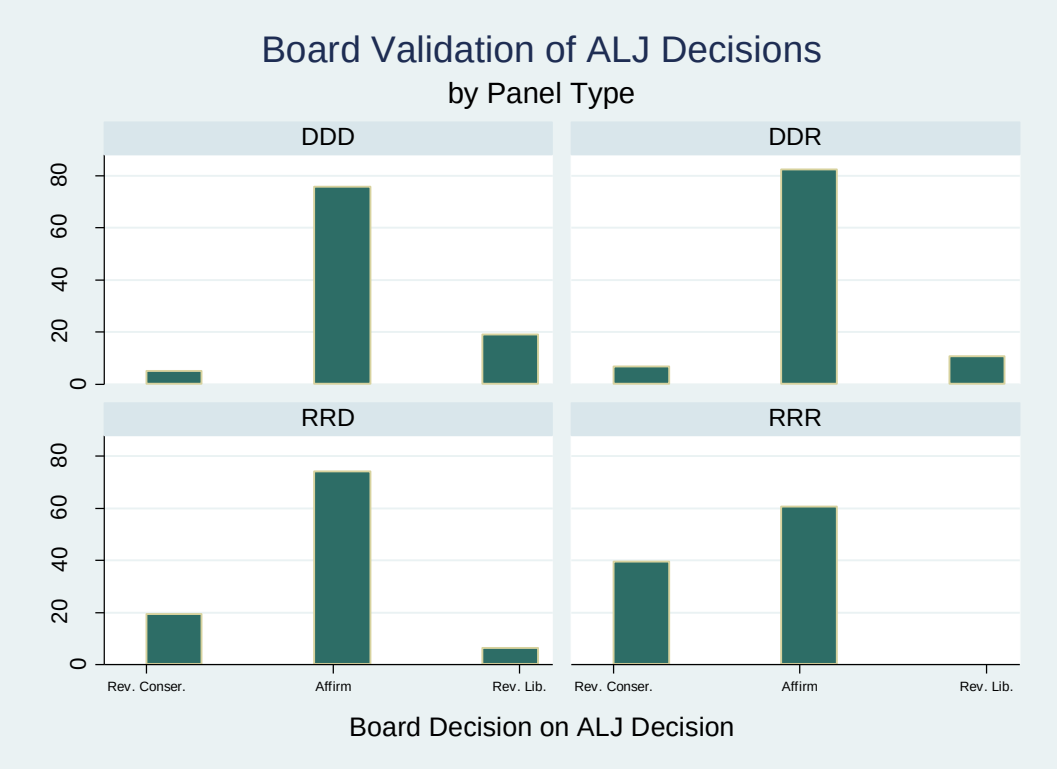


Figure 14



We see similar patterns if we look at the data in a more fine-tuned way. Many cases result in a split verdict, with the NLRB deciding some charges in a pro labor direction and others in the opposing direction. Figure 15 displays the results for an alternative coding of the dependent variable where split decision are assigned as either "leaning" toward labor or industry with a higher score meaning the decision is more pro labor. This figure uses the Coding Scheme 2 variable where I looked at the party challenging the case to assess whether the case should be assigned as favoring labor or not, though the results are virtually indistinguishable using Coding Style 1.[102] Democratic panels (DDD or DDR) decide 69-70% of cases wholly or partly in support of labor. Adding a Republican to the panel decreases the number to 56% of cases. Even

[102] The only difference in results is with respect to majority Republican panels. Under Coding Style 1, the mean pro labor score was 1.94 whereas using Coding Style 2 it is 1.85; likewise for all Republican panels, the mean scores varies slightly (1.154 v. .8974).

more remarkably, a panel composed entirely of Republicans will only rule entirely in favor of labor 26% of the time – nearly a 44% point difference from the rate by which unified Democratic panels rule entirely for labor. We see a similar spread when we compare the likelihood of all-Republican panels ruling against labor (25% for RRR v. 13% for DDD). However, with respect to split verdicts, the panels behave somewhat similarly. About 28% of RRR panels' decisions are split decisions in favor of industry; this compares with the 13% of labor-favored split decisions rendered by RRD panels and 5% of DDR panels. These patterns continue when the data is broken down by subject matter.

Figure 15

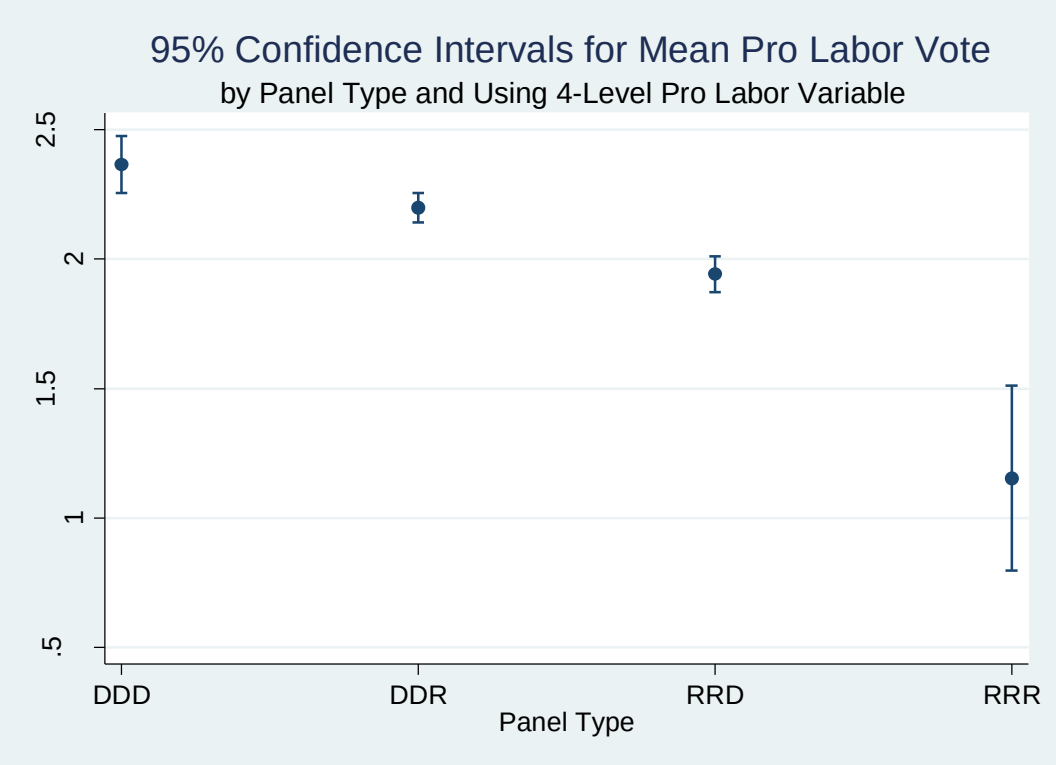
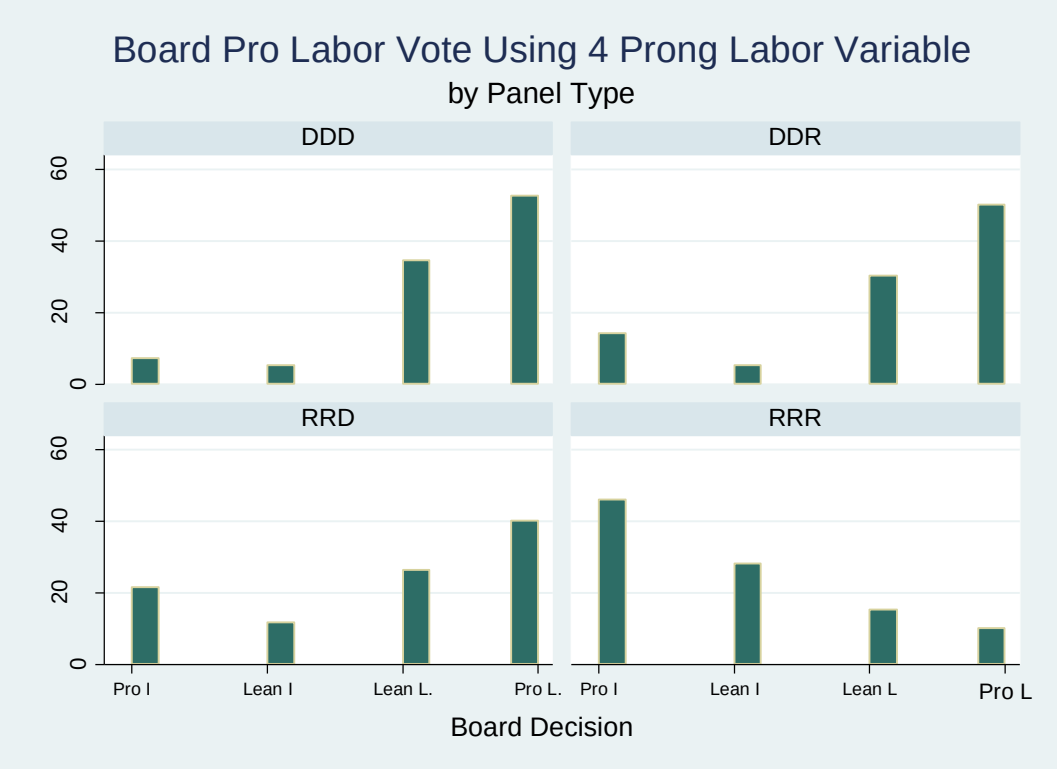


Figure 16



These patterns also persist if one looks at how the ALJ ruled. In cases in which the ALJ ruled wholly in favor of labor, DDD and DDR panels are virtually indistinguishable. But RRR panels only affirm a liberal ALJ decision 29% of the time compared to 100% of the time when the decision is conservative. Homogenous panels also tend not to affirm ALJ decisions that they disagree with ideologically; a DDD panel will vote to affirm in full an ALJ decision friendly to employers 50% of the time, whereas a RRR panel will affirm a labor friendly decision that it disagrees with 28% of the time. By contrast, mixed panels will still affirm in full an ALJ decision that they disagree with about two-thirds of the time (65% for RRD panels, 71% for DDR panels). This is consistent with what other scholars have found concerning the greater tendency of homogenous panels in the court of appeals to vote ideologically in upholding agency decisions.

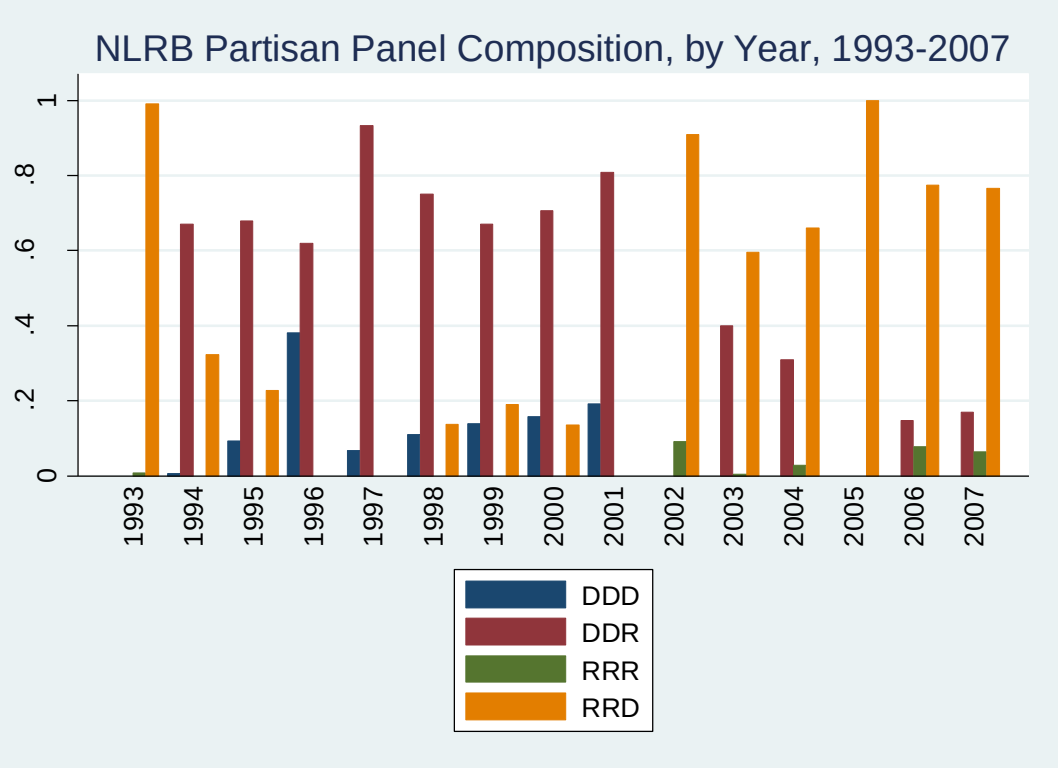
Nonetheless, while these patterns are interesting and are suggestive of panel effects, there are likely confounding variables that cloud the analysis. As shown in the Appendix, Table B and in Figure 17 below, the panel types are not constant through the period under study, and the overall chance of getting one type of panel over another very much depends on the year. For instance, a litigant could only get an RRR panel after 2002, while DDD panels only existed prior to 2000 in the time frame of this study. As such, in order to better understand whether the partisan composition of the panel impacts votes, one needs to look at the data taking these other considerations into account. I separated out the data pre and post-2002 and arrived at generally the same conclusions regarding the influence of panel effects during each indicated period. I also looked at the data broken down into distinct chucks of when the Board composition was relatively stable.[103] Results were the same. Breaking out the data based on the broader allows one to see exactly when partisanship takes hold. It remained generally the case that an additional Republican on the panel meant that the panel was less likely to rule in favor of labor.[104] Two noticeable trends became apparent. First, partisan panel effects appear to grow greater over time (with some exceptions). In the period before September 1996, the difference between the most liberal panel type (DDD) and most conservative panel type (RRD) was approximately 20 points. By the second period, this difference ballooned to 28 points. The onset of the presidential

[103] The first period covers Clinton's first term. During this time period, Democrats largely controlled the Board. Two non-recess appointed Republicans – Cohen and Stephens – were on the Board during this time frame. The second period begins in September 1996, when Clinton made his first Republican recess appointment to the Board. Clinton later nominated two other Republicans – Hurtgen and Brame – who often dissented from Board opinions during this time frame. The third period begins in December 2000, when Clinton appointed Democratic member Walsh to the Board as a recess appointment and the Board remained in Democratic hands for an entire year. Moreover, this is also a time frame in which there was some uncertainty on who would be the next President. The fourth period begins in 2002 after Bush had an opportunity to make two recess appointments to the Board to shift the Board to Republican control. During most of this time frame, only one Democratic inhabited the NLRB Finally, the fifth period starts in December 2004. By that point, during this time, two Democrats were on the Republican majority Board.

[104] During certain periods, there were no unified partisan panels.

election perhaps set forth a new era at the Board. There was a brief period of time between late 2000 and early 2002 when there was little Republican representation on the Board, and as such, the differences between panel types (DDD) and (DDR) was 6 points. However, once Bush got his recess appointees on the bench, the differences between panel types ballooned once again. In the period January 2002 to December 2004, there was a 47 point difference between DDR panels (the most liberal panel type possible, at 80% in favor of labor) and RRR panels (33% in favor of labor). This figure increased further in the last and final period to 54 points, with DDR panels deciding 83% of cases in favor of labor compared to just 29% of RRR cases deciding cases liberally. These differences are magnified if one restricts the analysis just to cases filed on labor's behalf (CA cases).

Figure 17



Statistical Analysis

I next present the statistical analysis to assess what impact, if any, ideology and panel effects have in impacting the Board's tendency to favor labor. Because the dependent variable in interest is dichotomous (1=pro labor, 0 = pro industry), I used logistic regression analysis to estimate an equation predicting the propensity of the Board to affirm the ALJ ruling in favor of labor relying on two different codings of the dependent variable, Coding Style 1 and Coding Style 2.[105] Independent variables included a host of political, economic and case-specific variables as well as a time trend variable/ year fixed effects, which I discuss in more detail below[106] The equation is as follows:

$$Y=\beta_0 + \beta_{1i}X_i + \beta_{2j}X_j + \beta_{3k}X_{k+} \varepsilon$$

Where β_{1i} indicates categories of variables concerning political characteristics, β_{2j} indicates categories of variables indicating economic considerations and β_{3k} indicates case variables. I hypothesize that the propensity to favor labor increases with each additional Democrat added to a panel. If the partisan identity of the panel impacts vote choice, I would expect the indicators on the panel variables to be negative, with the RRR having the largest substantive value. Specifically, I would expect the coefficient on the β coefficient for the three dummy variables representing panel type to be less than 0. Furthermore, in line with my theory that I think that legal considerations dominate decisionmaking, I would expect the coefficient on the β_{1i} to be 0. I would also expect that the coefficient on the lower court ALJ case to be substantively

[105] The variable *Y[jt]* is a binary variable taking a value of "1" if the Board decides the case *j* in time *t* and is "0" otherwise. There are key three dummy variables of interest, DDR, RRR and RRD, taking the value of "1" depending on the partisan configuration of the panel. The reference category is DDD. Vector *X*[*jt*] contains other economic, political and case-specific variables that could impact the *Y*.

[106] For brevity, I did not report the time variables here. None were significant.

significant and positive. For purposes of the statistical analysis, I used the Coding Scheme 2 as the basis for the coding of the dependent variable unless otherwise stated.[107]

Key Independent Variables of Interest: Ideology and Panel Composition

Partisanship of the Panel

I measured the key independent variable of interest – partisan ideology – in a few different ways.[108] In order to test the hypotheses, I came up with a variable to measure the panel's partisan configuration.[109] There are as such four combinations of panels that can occur on a three-judge panel: unified Democratic ("DDD"), mixed panel with a Democratic majority ("DDR"), mixed panel with a Republican majority ("RRD") and a unified Republican panel ("RRR").[110] The majority of cases are heard on mixed panels: 51% are DDR and 40% are RRD. Just over 1% of panels are unified Republican panels and a little under 8% are unified Democratic panels. Certain panels are only prevalent in certain years. During the Bush years, for instance, we see more RRD panels, with the opposite being true during the Clinton years.

[107] The correlation between the two schemes is .79.

[108] Scholars have debated the appropriate metric to use to measure ideology, with some favoring measuring ideology by looking to the party of the appointing president while others prefer a continuous, numerical measure (Epstein & King 2002; Pinello 1999; Cox & Miles 2008). Still others measure the ideology of Supreme Court judges by looking to newspaper editorial content as a proxy for ideology (Segal & Cover 1989; Segal & Epstein 1995).

[109] This figure is not based on party of the appointing president, because presidents often appoint members of the opposing party. Rather, the Board members' partisan affiliation is well-known, advertised on the NLRB's website and noted in the chart in the Appendix.

[110] Although cases are randomly assigned to panels, as an additional check, I examine the direction of the lower court ALJ vote (whether in favor of labor or not) across each panel type. There was no statistically significant difference among panel types concerning the direction of the lower court decision, thus suggesting there to be no linkage between the type of case and the judges assigned to hear it. As Eisenberg et al. (2012) point out, there is a non-random aspect to all case assignment, as there could be differences based on case specialization, seniority or workload. If assignment were not random, questions may arise with respect to whether panels receive different pools of cases. To confirm random assignment, I also regressed variables hinting at case characteristics (like statutory section challenged, region, etc.) on a dichotomous variable indicating the partisan composition of the panel, along with a time fixed effect variable (Berjado 2013). I also did a specification focusing on the directionality of the lower court decision, including whether the ALJ was a Democrat or a Republican.

Based on the Board member's political affiliation,[111] I assigned each case to one of the indicated panel types in order to see whether panel type impacted case results for the Board overall. I then created four variables: DDD, DDR, RRD and RRR. A "1" signals the presence of the panel type. In the regression analysis, all-Democratic panels served as the reference category.

In an alternative specification, I measured the tone of the Board's decision by compiling the individual ideology scores of the members present on the Board deciding the decision using information from the Nixon (2004) database of commissioner ideology. Nixon measures ideology by using an analysis similar to NOMINATE using past behavior of commissioners who served in Congress.[112] Based on these scores, I calculated the average ideology of the three-member Board that I used in the analysis predicting overall Board outcome. I then created three dummy variables for liberal, moderate and conservative Boards.[113] This alternative coding of the relevant dependent variable did not impact the results.

Other Independent Variables

Political Variables

President: The ideology of the presidential administration could impact case outcomes. Presidents make appointments to the Board and can choose the chair. Moreover, the president can use the resources of the Office of Management and Budget to monitor the Board's activities and to influence the agency's budget. Moe (1985) found that changes in presidential

[111] Admittedly, measuring judicial ideology by a binary measure is crude (Yung 2010). Though most academics use the party of the appointing president as a proxy for judicial ideology, here I use the actual party of the judge. The NLRB makes this information public, as it advertises the judge's political party on its website. Moreover, it is customary for a judge to reappoint a member from the party of the departing member. Clinton, for instance, appointed two Republicans to the Board.

[112] Nixon bases his scores on the ideology of the "pivotal veto override legislator" at the time of appointment. Use of this measures helps avoid the endogeneity problem of using votes to measure attitudes.

[113] Some scholars especially those in political science prefer using this alternative way of measuring ideology (Fisk & Heise 2009).

administrations play the most important explanatory role in explaining the Board's propensity to rule in favor of labor.[114] NLRB appointees serve five years terms, and because of the unwritten norm that presidents reappoint members of the same party, Republican presidents often appoint Democrats to the Board and vice versa. As such, it may be the case that Republican judges will moderate their views in advance of an upcoming election. I account for presidential administration by coding "1" for "Clinton" and 0 for Bush.[115]

Congress: The composition of Congress could impact how the NLRB will rule. Indeed, in studies of other federal agencies how Congress acts has a measurable impact on agency performance (Weingast & Moran 1985). The congressional committee serves as a "gatekeeper" for when the legislature will hold hearings on an agency or take other action. Congress also holds the purse strings on the NLRB. Moreover, particularly in the NLRB's early years, Congress often held hearings in response to what it perceived as unsuitable adjudications at the NLRB. Consistent with other scholars, I use Poole & Rosenthal (1997)'s NOMINATE scores to measure the ideology of Congress at the time of the Board decision.[116] As such, I compiled the NOMINATE scores of the median member of both the House and Senate oversight committees.[117] It is especially important to consider the opinion of the relevant congressional committees because they are often the primary means of delegation between Congress and the

[114] The only exception to this was that he found that inflation to have a more important impact during the Nixon years.

[115] In other specifications, I also employed Poole & Rosenthal's presidential NOMINATE scores.

[116] Other scholars used Americans for Democratic action scores or the AFL-CIO's COPE scores. Use of the NOMINATE scores allows for better comparisons between variables.

[117] In the House, the committee is the Education and Labor committee, while in the Senate, the Health, Education, Labor and Pensions committee oversees the NLRB. In an alternative specification, I use the DW-Nominate scores of the relevant subcommittee that oversees the actions of the NLRB instead of the committee. There is no discernible differences in the results. I also employed a specification where I simply used the DW-Nominate score for Congress in general at the time of the Board decision.

people. As Weingast and Moran (1985, 768) notes, congressional committees "possess sufficient rewards and sanctions to create an incentive for agencies to adhere to their wishes." During the time period under study, the ideology of the relevant House oversight committee shifted from being fairly liberal -.297 at the beginning of the Clinton administration to being much more conservative. The 1994 midterm elections prompted the median ideology to move to a much more conservative .1905 and the years since caused the median ideology to escalate with each midterm election to reach .306 in 2006. In the Senate, ideology scores have fluctuated more, being the most liberal in 2002, and escalating to .3495 after the 2004 elections.

Yet, while some scholars have found that Congress impacts the NLRB's voting, there are a few reasons why it is probably unlikely that that NLRB adjudications change in tune with changes in Congress (Moe 1985). Scholars have noted the tendency of Congress to give agencies broad statutory mandates, and to rarely cut agency budgets or conduct meaningful oversight hearings (Dobkin 2008). Any hearings that Congress does undertake typically concern the Board's workload as opposed to policy. In essence, Congress has essentially adopted a policy of "conscious inaction" with respect to labor policy (Brudney 2005, 227). In alternative specifications, I used a dummy variable to capture shifts in control of congressional control. For instance, during this time frame, there was a shift in House control with the 1994 election, and there were several shifts in Senate control as indicated previously. This alternative coding of the variable did not impact the results.

Judicial: The composition of the reviewing appellate court could impact how the NLRB will rule. Since Board decisions can be directly appealed to the relevant circuit court of appeals, it may be the case that the circuit courts influence how the NLRB will rule prospectively. A Board knowing that the decision could possibly be reviewed in the more liberal 2nd or 9th circuits may

be more likely to uphold a liberal agency decision than a Board decision that could possibly be reviewed in the much more conservative 4th, 5th, 7th, 11th and 12th circuits. Taratoot (2013) found that the ideology score of the relevant reviewing court impacted how the Board will rule. Moe (1985) too found similar results and noted that courts can have a "potent" power in nullifying, altering or setting forth Board decisions. Similar to Taratoot (2013), I used judicial common space scores (comparable to the NOMINATE scores discussed above) calculated on the basis of state congressional delegation of the President's party consisting of the median ideology of the relevant court of appeals in the region from which the case emanated (Giles et al. 2001).[118] Common space scores integrate the party of the appointing president with the ideology of the home senators of the judicial nominee.

Yet, as with Congress, there are a few reasons why it is unlikely that the NLRB affirmatively considers the ideology of the courts in deciding how they will rule. In the first instance, the NLRB would have to be quite knowledgeable about the appellate courts. It would have to know not only what appellate court the case would be heard at, but it would have to have a sense of the ideology of the judge's on that court. With respect to the first proposition, a party appealing a NLRB case has a choice of forum: they can appeal to the D.C. Circuit or to the respective regional courts of appeals where the conduct arose. The latter could present multiple options. The NLRB has no way of knowing in advance which forum will be chosen. Moreover, cases in the circuit court are heard by randomly assigned panels; it would be difficult, if not impossible, to know in advance the ideology of such a prospective panel and then go a step further and think prospectively what the ideology the panel may be. In addition, appeals from NLRB cases are relatively rare, with only about 1% of cases overall being appealed. NLRB has

[118] Similar to Poole & Rosenthal scores, judicial scores ranges from -1 from most liberal to +1 for most conservative. These scores are highly correlated with the party of the appointing president (.825).

also embraced an affirmative policy of nonacquiescence to the federal circuit courts, with the agency stating explicitly that it will refuse to follow precedent from circuit courts contrary to NLRB precedent (Revesz 1997). With these various factors in mind, it would be quite surprising if circuit court ideology turned out to be a statistically significant variable in predicting the tone of NLRB's decisions.[119]

Economic Variables

Unemployment Rate: The NLRB's decisions can echo through the economy, such that the NLRB may react to exogenous changes in the wider economic environment. Although some scholars have found the unemployment rate to be related to coincide with votes for labor, others have found the opposite (Cooke et al. 1995; Moe 1985). Moreover, some have suggested that unions are less active during time of high unemployment (Hibbs 1976; Moe 1985). I gathered information on the annual unemployment rate at the time of the Board decision from the U.S. Department of Labor Statistics.[120]

Rate of Inflation: To measure inflation, I use the annual consumer price index ("CPI") reported by the Labor Department. As with unemployment, scholars have reached differing conclusions on the impact that each have on Board outcomes (Cooke et al. 1995; Moe 1985). Since there was so high multicollinearity between the two economic variables, I opted to report regressions only using the inflation rate.

[119] In an alternative specification, I also employed the ideology of the United States Supreme Court at the time of the Board decision. It would be quite surprising for the ideology of the Supreme Court to have a downstream impact on the tone of the NLRB's decisions for the simple reason that Supreme Court review is so remote. Moreover, the Supreme Court rarely will decide issues relating to the NLRB that do not also involve broader questions concerning the administrative state generally. As such, it is not surprising that the Supreme Court's ideology appears to have no hearing on NLRB decisions.

[120] In alternative specifications, I include lags for the economic variables. I also tried using the change in the unemployment rate from the time of the ALJ decision.

Case Specific Variables

Tone of ALJ Decision: I coded, and confirmed with the agency databases, the tone of the ALJ decision in the same manner as I did for the Board decision, coding as "1" if the decision was pro labor and 0 otherwise. If the ALJ ruling affirmed the Regional Officer's decision in whole or in part, I awarded a "1." The issue gets tricky because sometimes the ALJ will affirm parts and dismiss parts, and sometimes, all or only part of it will be appealed. So I tried alternative specifications where I looked at the split cases to discern if the case is more or less pro labor. Controlling for the ALJ decision in this way is important because for the most part, the Board is constrained by what the ALJ says and does (Taratoot 2013). I constructed an alternative variable that I used in the analysis that follows to assess whether the ALJ decision matched the Board decision; if the decision matched entirely, I coded it as "1"; if it did not match, in whole or in part, I coded it as "0."

Case Mix:

Selection effects may also be at work. Litigants may behave strategically in response to Board behavior and adjust their filing behavior accordingly (Roomkin 1974).[121] According to the Priest-Klein (1984) model, if parties have perfect information, 50% of cases would be affirmances, with the remaining 50% of cases being reversals because parties would settle to avoid other possibilities. Democratic litigants may have the belief that a Democratic Board will be more likely to issue a ruling with a more favorable substantive standard than a Republican Board, and will thus wait to bring charges if it appears likely that the Board will soon tilt.[122] As

[121] Rookin (1974, 249) suggests a "positive relationship between the demand for Board intervention and the likelihood of a charging party winning the case."

[122] Roomkin, however, found that while unions may be more likely to file cases under Democratic administrations, they were no more likely to win them. He predicted that once unions figured this out, unions would change their behavior accordingly.

such, they may bring more cases when the probability of having a Democrat is the greatest. Litigants may also use the NLRB for "self-serving purposes" to achieve delay in a union election, to commence negotiations with a union or to simply harass the opponent.

There also may be a "feedback effect" at work as well. In his study of the NLRB, Moe (1985) found that the percent of labor filed cases increases in line with both the regional staff's filtering decisions as well as the Board's formal decisions. To understand this, it is important to explain how cases are filed at the NLRB. In Chapter 3, I presented a flow chart describing how a case gets filed at the NLRB. A case is filed at a regional office where the regional staff investigates it. The staff recommends either that a complaint issue or the charge be dismissed. While the regional officer's decision may be appealed to the General Counsel's office in Washington D.C., only 1% of such appeals are greeted with success. At this stage, the vast majority of cases are withdrawn or dismissed. Any remaining cases proceed through adjudications, with the NLRB General Counsels' officers acting as prosecutor. An ALJ will first hear the case in a trial-like setting and the losing party before the NLRB may appeal the case to the Board. The losing part(ies) file what are known as "exceptions" to the ALJ decision. In many cases, the losing party as well as the General Counsel will file exceptions. Most cases are then heard by three member panels of the Board, with the most important cases being heard by the full Board.[123] Litigants may thus alter their behavior in response to changing legal rules, and these changes in rules can affect the type of cases in the pool (Moe 1985; Priest 1985; Eisenberg 1990). As Moe (1985, 1098) argues, "[a]n exogenously caused change in any one component would reverberate through the whole system, causing a whole series of adjustments in all three

[123] Losing parties have a chance of judicial review of an adverse Board decision in the federal circuit court of appeals. The NLRB must also go to the circuit court to enforce a Board order.

components as they mutually adopt."[124] For instance, if the Board moves decisions in a pro-labor direction, unions may file more cases and the staff in turn may adapt as well to both constituent filing decisions and Board decisions.[125] This has both a direct and an indirect effect on the staff, as the staff is more likely to side with labor. However, the indirect effect is that as more cases are filed and the merit quality drops, the staff becomes less likely to rule in favor of labor because there are fewer chances overall to do so. If one assessed Board behavior by looking at its propensity to favor labor over industry, we would then expect to see the Board move in a pro labor direction followed by a set of "moderating adjustments" in behavior in response to changes in the case mix.

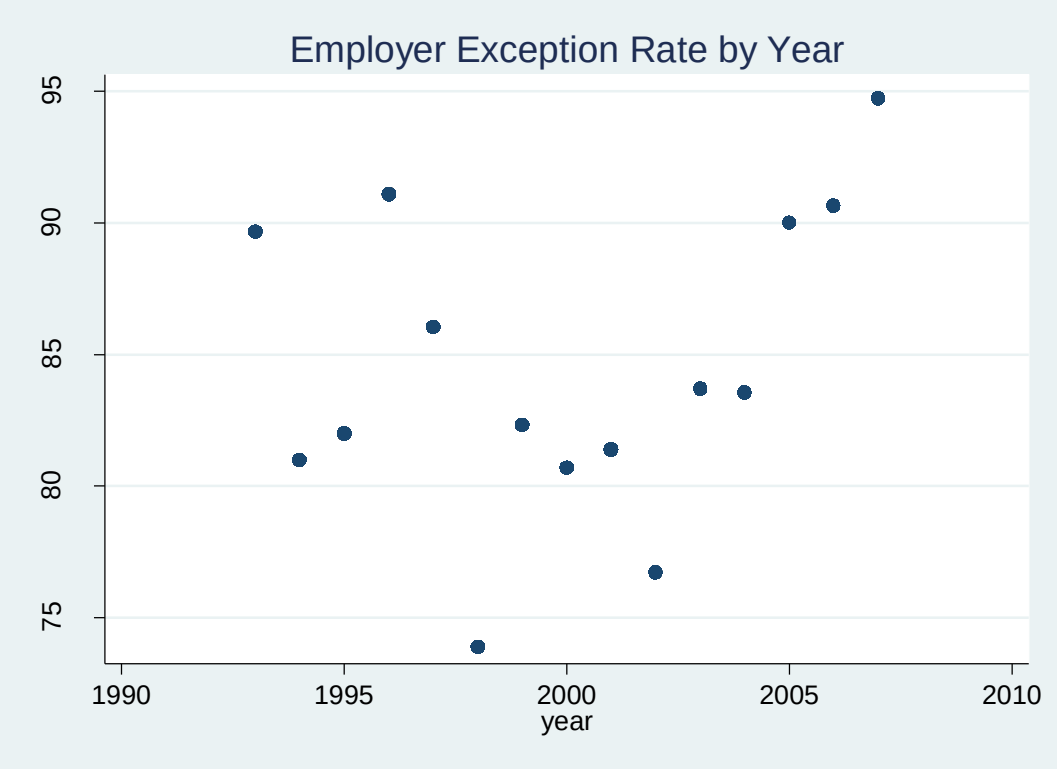
To measure case mix I calculate the rate by which employers file exceptions to ALJ cases as a percent of all cases. Through the period under study here, employers filed exceptions in about 78% of the cases and in 84% of all CA cases filed by labor or individual employees. There are some interesting variations to this pattern, however. Looking at Figure 18, two things stand out. The year 1998 had the lowest rate of exceptions. Because it typically takes two years for a case to be heard before the Board, employers who had the option to wait may have opted to see who would get elected President in 2000. If a Republican were elected, employers would have a much greater chance of prevailing before the Board potentially. The only anomaly is 2002, where employers filed exceptions in only 76% cases in CA cases- a decline of 8% from the 84% average. This decreased number of employer exceptions relative to the number of overall cases could be explained by the fact that there might have been some uncertainty on how the Board

[124] Moe (1985) also notes that there could also be a "mutually adaptive adjustment" between political actors and the NLRB. However, he said it was reasonable to assume that the actions of political authorities are exogenous.

[125] Indeed, Moe (1985) found empirical support for the notion that constituent filing behavior and Board decisions explained nearly all the variance in staff filtering decisions. Moreover, constituent filing decisions were also strongly related to staff filtering decisions and Board decisions.

under Bush would rule. There might have been more settlements or withdrawals of cases during this period as well. Because there is approximately a two year lag (approximately 550 days) between the ALJ decision and the Board decision, ALJs first heard many of the cases decided in 2002 back in 2000 or slightly before. Although there may be alternative ways to construct this variable, the percentage of total cases in which employers file exceptions likely serves as a good guide to control for some of these trends regarding case mix.[126] The highest rate of exceptions occurred during the latter stages of the Bush presidency, once it was firmly established that employers potentially had the chance to get panels composed of majority Republicans.

Figure 18



However, there are a few reasons why it is unlikely that selection effects play much of a role in impacting the results, contrary to what one may think on first blush. While the Board's

[126] In addition in other iterations of the model not reported here, I lag this variable by two years.

propensity to decide for or against labor has no doubt fluctuated over time as it responds to pressures from labor and the wider political and economic environment, there is really no long-term trend in either direction. In his earlier study of the NLRB, Moe (1985) made a similar finding; he discovered that the Board's propensity to decide cases in favor of labor had a historical mean of .5, meaning that while there may be fluctuations, it is generally equally likely that the Board will find a violation for an employer or union. Moreover, while changes in presidential administration motivate shifts in the Board's propensity to rule in favor of labor, an equilibrating mechanism eventually takes hold and cases revert to the mean after an initial shift.

There are also other factors at work that reduce the opportunity for a party to behave too strategically. One could also make the argument that the results could be biased because parties may choose to settle once they learn of the panel that will hear the case. However, scholars studying this issue on the circuit court of appeals have found that early announcement of the panel did not appreciably affect settlement behavior (Jordan 2007). The NLRB, of course, is a bit different than the circuit courts because during certain periods, one can easily predict the possible panels that might hear the case; in some periods, it is not possible to get a unified Republican panel, for instance. However, a party must file an appeal shortly after the ALJ decision, and it takes well over a year or two for the Board to hear the case and then get a panel randomly assigned. According to the NLRB Annual Reports, it takes over 500 days from the time of the ALJ decision for the Board to rule on a case.

When a party files an unfair labor practice disputes, they have no way of anticipating the composition of the Board years down the road when the Board will hear the case, especially if there is an intervening presidential election between the time of the ALJ decision and the Board decision. Parties will only learn the actual panel composition shortly before the hearing (Revesz

2000). At that point, the marginal cost of an appeal is relatively low (Rash 2009). At many points in the process, it is no secret what the general ideological tendency of the Board is; during a Democratic administration, there is a greater chance you will get a Democratic judge, while during a Republican administration, the odds change. As such, the panel announcement may not offer any additional useful information because the general ideological tendency of the Board may be known even at the time of the ALJ decision. The information is also available to both sides, so while disclosure may prompt one party to want to settle, it can equally compel the other party to harden its stance to have the case heard by a friendly Board.[127] Moreover, many of the parties in NLRB proceedings are repeat litigants, and as such they may have less incentive to settle because they may want the Board to issue a favorable legal ruling applicable to future cases (Revesz 2000).[128]

Moreover, to ensure that the mix of cases is fairly consistent across panels and years, I regressed case characteristics, such as statutory section, number of charges, region of the country, tone of ALJ decision and tone of Board decision, on panel type and found there to be no statistically significant differences between panels. I did a similar analysis with respect to years and found no discernible differences to indicate that case composition differs measurably from year to year (Berjado 2013). All told, it is generally the case that the type of cases that the Board hears are fairly consistent year to year.

Number of Charges: I coded each case to reflect the number of charges against the charged party. The number of charges could influence Board decisions in one of two ways. The number of charges, for instance, could be positively related to liberal Board outcomes, because it may be

[127] For other reasons why early disclosure may not prompt settlement, *see* Jordan (2007).

[128] Richard Revesz (2000) notes, for instance, that announcing the panel may lead repeat parties to actually not settle because they have a self-interest in ensuring that the court issues a legal ruling applicable to future cases.

the case that as the number of charges increases so does the probability of a decision against the respondent (Taratoot 2013). But it may also be the case that there are diminishing returns with increased charges, and that more charges becomes redundant. The number of charges also would likely contribute to an increased probability that the Board will split the decision (rule in favor of labor on some charges and against labor on others).

Type of Case: I separately analyzed CA (against employer) and CB-CD cases (against unions), and I separated out the analysis for CA cases based on the portion of the statute the employer is accused of violating: section 8(a)(1), 8(a)(3), 8(a)(5) or 8(b).[129] I would hypothesize that it would be easier for the Board to interject partisanship into the decisionmaking process in cases where the legal standard is more nebulous. For instance, charges brought under section 8(a)(1) generally rests exclusively on credibility determinations; even if the Board wanted to find for or against one party or another, as a legal matter, it would be difficult to do anything other than affirm the ALJ decision. By contrast, section 8(a)(5) cases involve the more loose standard of deciding whether or not the employer (or union in CB cases) acted in "good faith." While the underlying factual issues of such a "good faith" determination rests on credibility grounds, the ultimate weighing of those facts and the assessment of whether the totality of those facts constitute "good faith" offers the opportunity for ideological attitudes or partisan decisionmaking to influence the process much more so than if the challenged legal rests solely on a credibility determination. As such, taking into account the specific statutory sections challenged lends greater credence to the robustness of the results.

Region: The region that the case emanates from could also impact the results, with the Board perhaps deciding cases differently from different regions. Cases hailing from the South, for

[129] There were only a few cases with challenges under section 8(a)(2) or 8(a)(4).

instance, may be less pro labor. Moreover, the Board may think more highly of the work from one region and thus may be more likely to affirm the results of decisions of ALJs from that region. I coded this as a dummy variable, with "1" indicating that a case emanating from the South.[130]

Year Fixed Effects: The status of labor in American society remained relatively stable throughout the 16 year period under study. Congress passed no major laws, and there were no significant changes in the public's attitude of labor or labor unions. There could, however, be some uncaptured time trend not picked up by the other variables that might explain the Board's voting behavior. I included year dummy variables for each year; in another specification, I included a time trend variable.

[130] The ALJs hear cases out of four regions: Atlanta, Washington D.C., San Francisco and New York. In alternative specifications, I included dummy variables for each of the aforementioned areas, using Washington D.C. as the reference category. The results did not differ.

Table 1: Logit Regression, Coding Style 1: Predicting Ideology of Board Outcomes

	(1) All Cases	(2) CA Cases	(3) CB Cases
DDR[131]	**-1.242**** **(0.405)**	**-1.204**** **(0.460)**	**-1.126** **(0.790)**
RRD	**-2.541***** **(0.439)**	**-2.505***** **(0.493)**	**-2.430**** **(0.831)**
RRR	**-3.623***** **(0.670)**	**-3.455***** **(0.738)**	0 (.)
Clinton	0.0961 (0.337)	0.144 (0.355)	-0.508 (0.964)
Congress	-1.293 (0.836)	-1.123 (1.007)	-0.788 (1.997)
Court	0.385 (0.386)	0.232 (0.429)	0.909 (0.958)
ALJ Pro Labor	**4.515***** **(0.187)**	**4.603***** **(0.208)**	**3.826***** **(0.493)**
Inflation	0.00903 (0.0140)	-0.00131 (0.0155)	0.0350 (0.0397)
Exception	0.0239 (0.0199)	0.0569* (0.0224)	-0.104 (0.0541)
# of cases	-0.000523 (0.0201)	0.00319 (0.0216)	0.0221 (0.0532)
S8a1	**0.939***** **(0.231)**	0.365 (0.366)	
S8a2	0.716 (0.468)	0.708 (0.550)	
S8a3	-0.113 (0.173)	-0.152 (0.187)	
S8a4	-0.208 (0.312)	-0.169 (0.351)	
S8a5	0.127 (0.179)	0.0385 (0.190)	
South	-0.246 (0.236)	-0.243 (0.260)	-0.111 (0.536)
_cons	-3.842 (2.419)	-4.271 (2.590)	2.412 (6.455)
N	2675	2461	214
Pseduo R2	0.5034	0.4625	0.3928

Robust standard errors in parentheses. Time fixed effects not shown for brevity.
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

[131] DDD panels served as the reference category.

Table 2: Logit Regression, Coding Style 2: Predicting Ideology of Board Outcomes

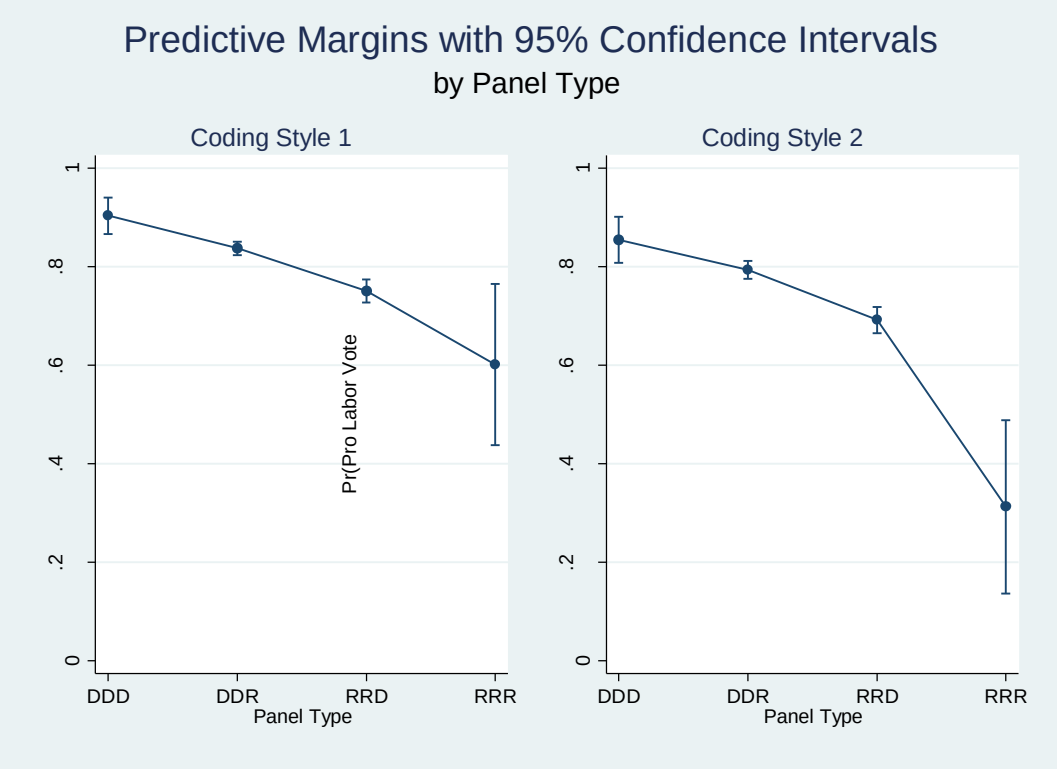
	(1)	(2)	(3)
	All Cases	CA Cases	CB Cases
DDR[132]	**-0.685***	**-0.603**	**-0.813**
	(0.316)	**(0.354)**	**(0.684)**
RRD	**-1.552*****	**-1.467*****	**-1.624***
	(0.333)	**(0.369)**	**(0.721)**
RRR	**-3.531*****	**-3.371*****	**0**
	(0.573)	**(0.610)**	**(.)**
Clinton	-0.208	-0.214	-0.165
	(0.249)	(0.262)	(0.762)
Congress	-0.454	-0.364	-0.0404
	(0.684)	(0.799)	(2.245)
Court	0.0538	-0.128	1.240
	(0.268)	(0.283)	(0.843)
ALJ Pro Labor	**3.406*****	**3.484*****	**2.884*****
	(0.156)	**(0.175)**	**(0.431)**
Inflation	**-0.0208***	**-0.0306****	**0.0332**
	(0.0106)	**(0.0116)**	**(0.0329)**
Case Mix	-0.00321	0.0174	**-0.0970***
	(0.0153)	(0.0173)	**(0.0475)**
# of cases	0.000891	0.00575	0.0139
	(0.0160)	(0.0173)	(0.0444)
S8a1	**0.497****	0.220	0.621
	(0.187)	(0.267)	(0.740)
S8a2	0.0453	0.00141	0
	(0.436)	(0.477)	(.)
S8a3	-0.163	-0.174	-1.880
	(0.133)	(0.141)	(0.977)
S8a4	0.0295	0.0627	0
	(0.287)	(0.309)	(.)
S8a5	0.117	0.0750	0.477
	(0.135)	(0.144)	(0.743)
South	-0.0926	-0.0209	-0.624
	(0.167)	(0.178)	(0.496)
_cons	3.373	3.509	1.988
	(1.791)	(1.865)	(5.300)
N	2675	2461	214
Pseudo R	0.3130	0.2721	0.2605

Robust standard errors in parentheses. Time fixed effects not shown for brevity.
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

[132] DDD panels served as the reference category.

Tables 1 and 2 shows the results for all cases as well as for CA and CB cases, respectively using both coding styles. Overall, we see a noticeable panel effect, even holding other variables at their means. In the first two models for All Cases and CA cases, the coefficients on RRD and RRR are negative and statistically significant, indicating that they are all less likely to grant relief than all Democratic panels. For Coding Style 1, the coefficient for the DDR is also statistically significant at the 95% confidence level. For the CB case model, only RRD is statistically significant. Most striking is the difference between panel types. Figure 19 shows the predicted probabilities using both Coding Style 1 and 2 examining CA cases only. Holding all other variables at their mean, an all-Democratic panel will grant relief to the labor litigant 90% of the time; substituting a Republican in for one Democrat changes this figure to 84%. The figures decrease for each Republican added to the panel: when the panel has only one Democrat instead of two, the predicted probability is 75%; this number declines to 60% when the panel is all- Republican. Panel effects are even more stark using Coding Style 2, where there is nearly a 50% difference between all Democratic and all Republican panels. Moreover, there is a large difference between RRD and RRR panels, with RRD panels having a 69% probability of voting for the labor party, while RRR panels vote in favor of labor 31%. Furthermore, DDR panels are not different statistically from DDD panels using the more legalistic Coding Style 2. Moreover, while the tone of the ALJ decision is the most substantively important variable predicting labor outcomes at the Board, the panel configuration persists as a statistically significant variable in regression models even when one accounts for the direction of the ALJ decision. In all, irrespective of legal considerations, panel type matters.

Figure 19



These results apply as well if one restricts the analysis to just labor cases or employer cases; it also persists if one restricts the analysis to certain statutory violations.[133] As shown in Figure 20, panel effects are most evident in CA cases filed against employers.[134] By contrast, while there is a large difference between DDD and RRD panels (52% v. 28%), it is difficult to make too much of this result because it falls within the margin of error. Also of note is the fact that the coefficients on the section 8(a)(1) dummy variable is significant in the regression for All Cases. This significance of both the ALJ variable as well as the statistical significance of some of statutory section variables underscores how important legal considerations impact Board

[133] The results are also robust to different configurations of the standard errors.

[134] The graphs in this figure were calculated using Coding Style 2.

decisionmaking. I also did other analysis where I restricted the analysis to only section 8(a) (1) cases, etc. for each statutory section (Figure 21). Patterns remained the same.

Figure 20

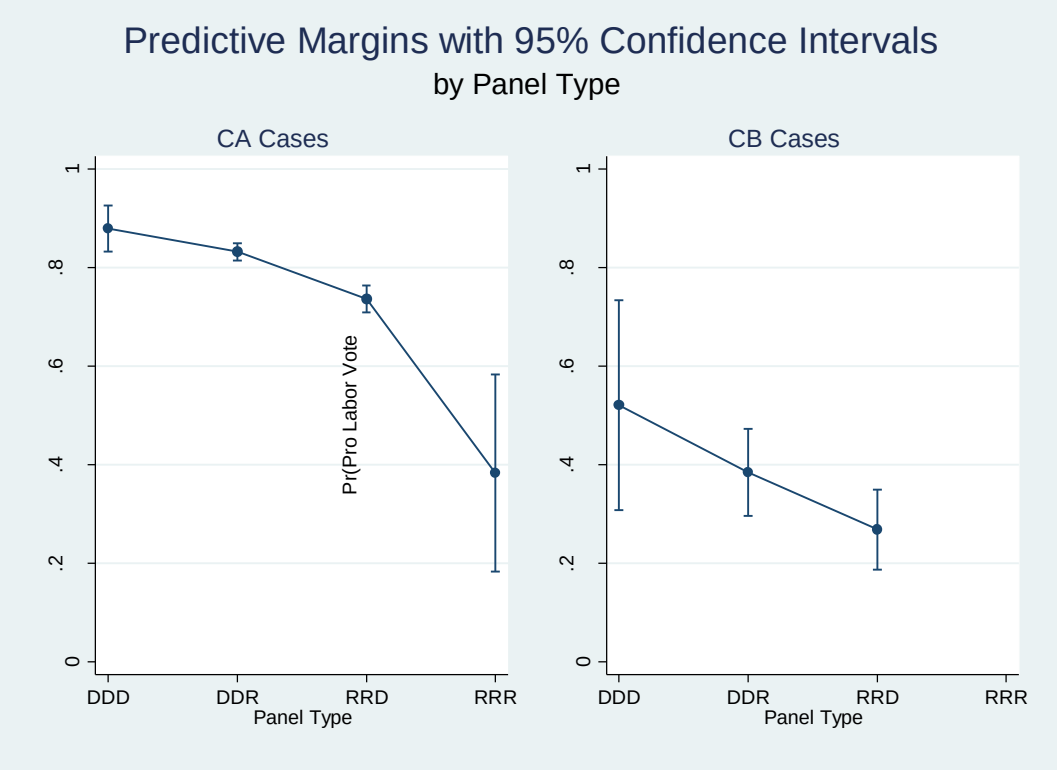
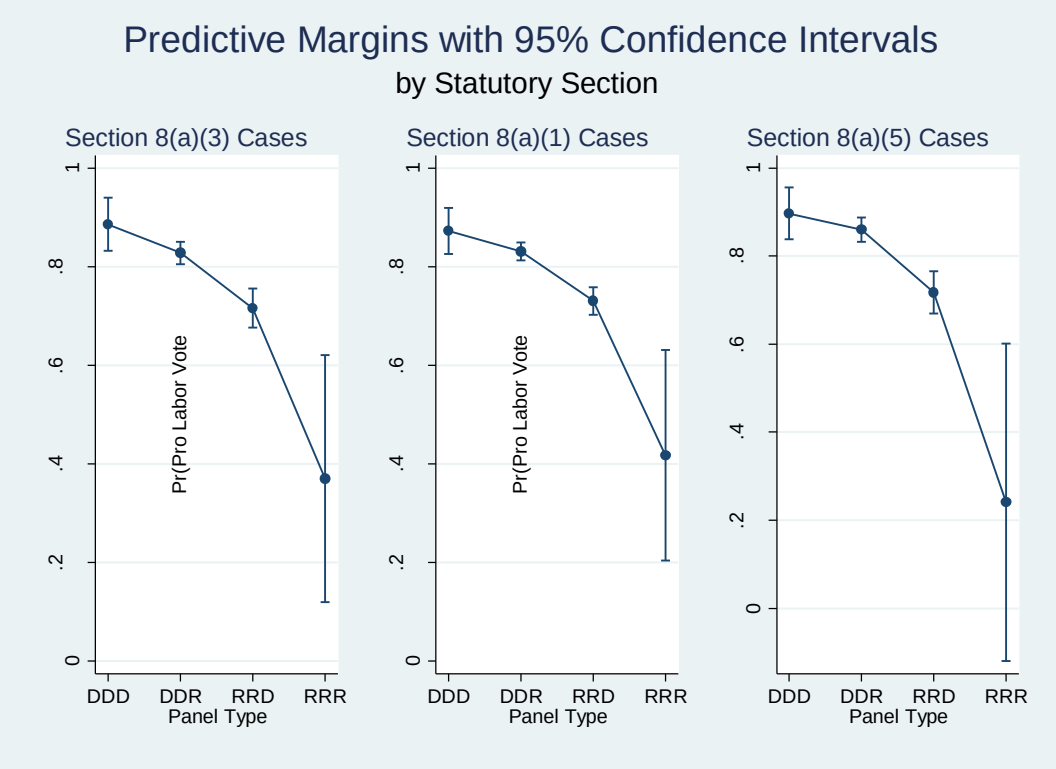
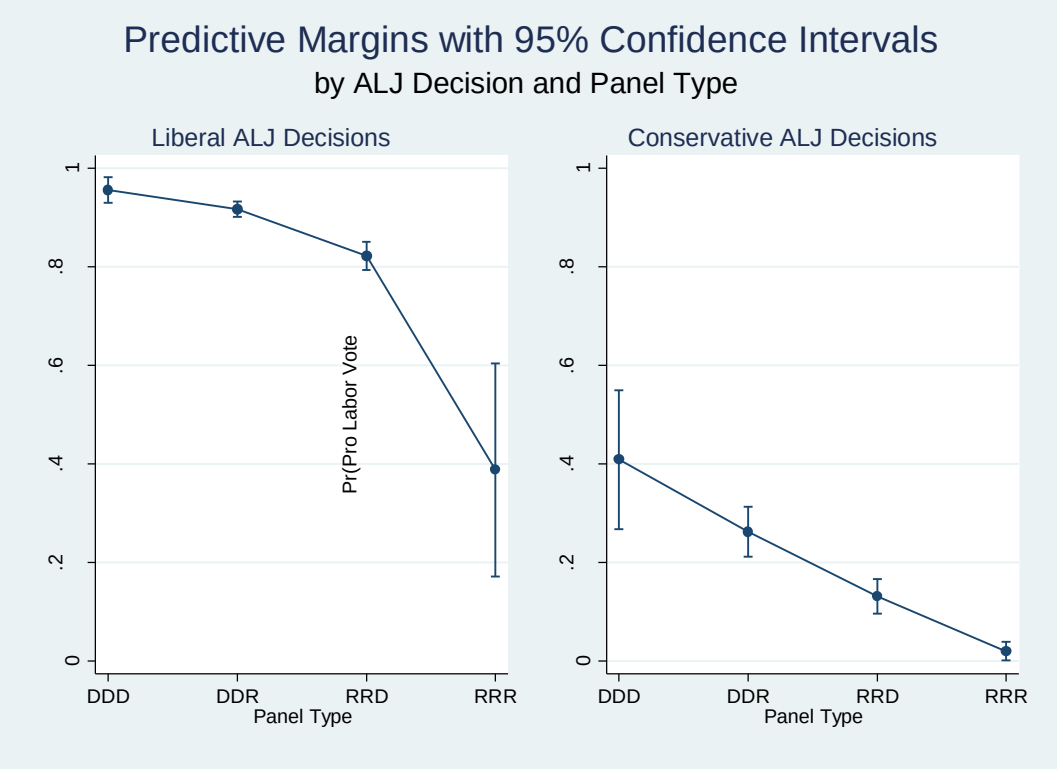


Figure 21



The results persist if we look at the data broken down by the ALJ decision (Figure 22). If we hold all the variables at their means, and if we assume that the ALJ decision is in favor of labor, then all Democratic panels will vote in favor of labor 96% of the time whereas all Republican panels vote in labor's favor only 40%. If the ALJ decision is conservative, panel effects are clear between Democratic-majority and Republican-majority panels. Republican majority panels have almost a 0% probability of voting in favor of labor in these circumstances, whereas an all Democratic panel will vote opposite to the ALJ in favor of labor about 40% of the time. Likewise, there are noticeable differences with mixed panels, with DDR panels having a predicted probability of 26% and RRD panels having a figure of 13%.

Figure 22



Additional Robustness Checks

To confirm my results, consistent with the approach used by Hall (2009, 2010), I also exploited the fact that cases are randomly assigned in order to do a simple test using Board composition fixed effects. As noted in the Appendix B, Board composition changed often. There were about 30 different sets of Board compositions during this time period.[135] Indeed, board composition changed every few months as new members were added to the Board or as appointees waited to be confirmed, sitting as recess appointments in the interim. Following Hall (2009, 2010), I created a new variable "Board composition fixed effects" to account for the period in time in which each case was heard. This variable is a dichotomous indicator variable for each time period in which the Board composition remained constant. Because cases at the

[135] As noted in Appendix B, about 10 of the court compositions lasted only a matter of days.

Board are generally randomly assigned,[136] one can model the data as a natural experiment, with the only difference between the cases being the panel type assigned. This approach has the benefit of being able to account for endogenity in the data (due to the extent any exists) because under an assumption of random assignments, we can assume that case characteristics among the panels would be similar across panel type, with the only difference between panels being the "treatment" of panel type. The results using this alternative system comported with the earlier analysis. Table 3 and Figure 23 displays the data. If anything, the results underscore the panel effects, between Democratic Boards and Republican Boards.

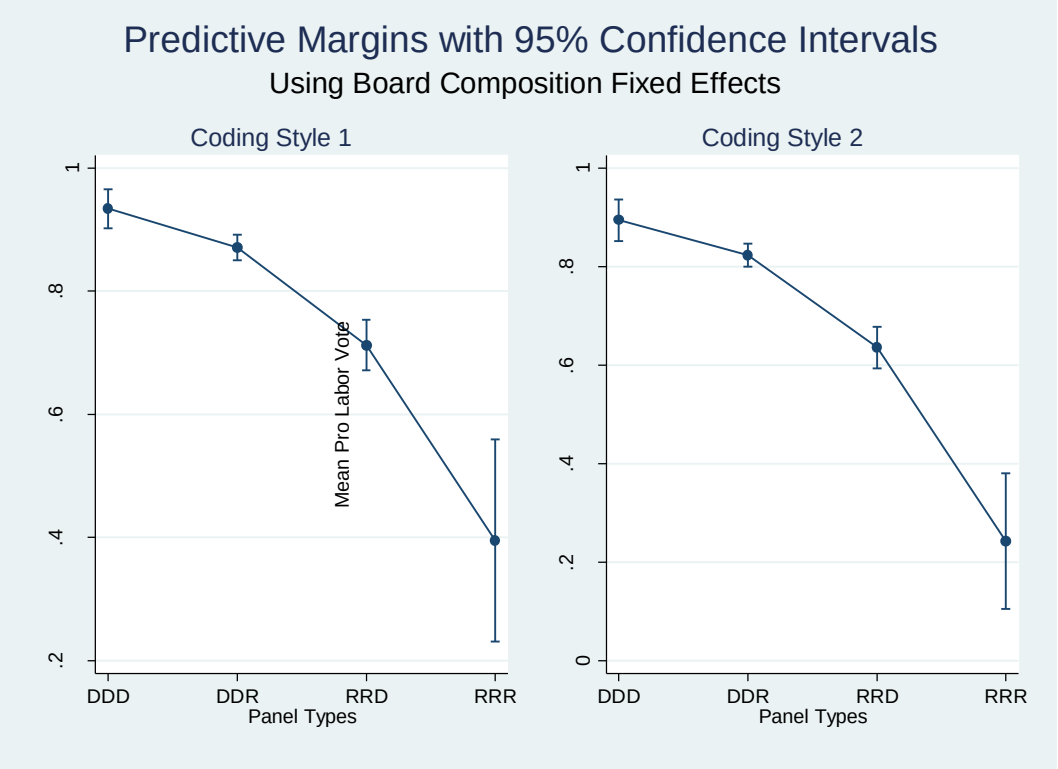
Table 3: Logit Regression Using Board Composition Fixed Effect Randomization Technique: Predicting Ideology of Board Outcomes

	(1)	(2)
	Coding Style 1	**Coding Style 2**
DDR	-0.743**	-0.597**
	(-2.87)	(-2.64)
RRD	-1.742***	-1.577***
	(-5.81)	(-5.96)
RRR	-3.074***	-3.273***
	(-6.72)	(-7.08)
_cons	3.806***	3.745**
	(3.31)	(3.22)
N	2675	2675

t statistics in parentheses; fixed effects for Board composition eliminated for brevity.
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

[136] I filed a Freedom of Information Act request with the NLRB. The NLRB took the position that there are no documents showing how they assign cases and they would not confirm orally that cases are randomly assigned since they argue that such information concerns "office procedures" that are excludable from dissemination under FOIA. In several NLRB documents I found on the NLRB website, however, the NLRB notes that it generally randomly assigns cases, and notes that there is no written procedure on how they allocate cases.

Figure 23



As noted before, the analysis above may be tainted by the fact that the propensity to get a certain panel depends on the specific time frame; as such, it may be overestimating the effect, even though case mix and year fixed effects/time trend are included in the model. As such, I redid the analysis separating out the Clinton and Bush Boards, pre and post 2002 for CA cases only.[137] For data pre-2002 dominated by a Democratic Board, if the panel had at least two Democratic members, the panel ruled in favor of labor about 89% of the time holding all variables at their means. However, if two Republicans were on the Board (RRD panels), the NLRB ruled in favor of labor only 79% of the time. As before, the coefficient on the RRD panels is statistically significant, while there is little to no difference between DDD and DDR panels statistically. Post 2002, DDR ruled in favor of labor about 85% of the time while RRD

[137] The analysis for all cases and CB only cases is similar.

panels ruled in labor's favor 68%, holding all else at the means. The number declines to 31% for all Republican panels. Adding more Republicans to the panel increases the propensity to rule in favor of labor irrespective of time period.

Table 4: Logit Regressions: Predicting Ideology of Board Outcomes, Pre vs. Post-2002

	(1) Before 2002	(2) After 2002
DDR	-0.660	0
	(0.388)	(.)
RRD	**-1.254****	**-1.316*****
	(0.450)	**(0.305)**
RRR	**0**	**-3.075*****
	(.)	**(0.584)**
Congress	-1.501	-10.12
	(0.964)	(15.74)
Court	0.0781	-0.0504
	(0.437)	(0.378)
Pro Labor ALJ	**3.781*****	**2.787*****
	(0.203)	**(0.297)**
Inflation	0.0138	**-0.0984***
	(0.0217)	**(0.0398)**
Case Mix	0.0455	0.130
	(0.0243)	(0.0737)
Number	0.00410	0.0112
	(0.0224)	(0.0278)
S8a1	-0.291	0.660
	(0.317)	(0.398)
S8a3	-0.225	-0.142
	(0.205)	(0.202)
S8a5	0.180	0.0260
	(0.218)	(0.196)
South	-0.148	-0.00948
	(0.256)	(0.248)
_cons	-6.051	9.367*
	(4.677)	(4.361)
N	1676	999
Pseudo R	0.5619	0.4196

Robust standard errors in parentheses; year fixed effects omitted for space.
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

I also alternatively changed the ALJ variable. Instead of the pro labor vote of the ALB, I changed the ALJ variable as to whether or not the Board validated the ALJ decision. Using this alternative coding of the ALJ variable, panel effects were still evident. I also did specifications where I included two forms of the ALJ variable: one for validation (whether the Board agreed with the ALJ decision) and one for the tone of the ALJ opinion (whether or not the ALJ was pro labor or not). I interacted them as well. The results were the same as above.

That said, however, panel composition is not the most substantively important factor in impacting vote choice. As with the other models, the ALJ decision as well as the statutory section (in one regression) challenged both are statistically significant in predicting the tone of the Board decision, thus underscoring the important role that legal issues have in pervading Board decisionmaking. Moreover, when I did other regressions, this time using the ALJ decision as the dependent variable, I found that the statutory sections were significant. That is, the ALJ was more inclined to rule in labor's favor in particular if there were a section 8(a)(1) allegation listed. No other economic, political or case specific variables were significant, other than section 8(a)(1).[138]

In other specifications not reported here for brevity I explored distributed lags on some of the right hand side variables. For some of the data, particularly the economic data, it would be proper to impose a lag of one period of time in order to give the Board time to react to changes in economic conditions (Moe 1985). I also explored interactions between economic conditions, presidents and Congress, as the impact of economic conditions may vary depending on relevant political actors and their own responses to economic conditions.

[138] In these regressions, I used the party of the ALJ judge to proxy for judge ideology. Even accounting for that variable, it was the legal variables that stayed significant in predicting the propensity of the ALJ to rule for labor.

As noted, unless listed I concluded much of the above statistical analysis using what I considered to be the more "accurate" dependent variable created using Coding Scheme 2. In that scheme, I looked at what party challenged the decision so I was able to get a better sense of whether the NLRB had occasion to rule for or against a party; a case could still be pro labor yet the procedural posture may be such that the labor litigant actually "lost" before the Board. This is so because the Board may have simply affirmed the ALJ's findings, and in so doing refused to enhance the ruling in the pro labor direction desired by the labor litigant. I reanalyzed the results using the alternative coding of the dependent variable that more generously allocates cases to the pro labor category. The results as far as statistical significance were similar, with the exception that in the full model of all cases, the DDR variable also reached significance, signifying a difference between DDR and the reference category DDD. Moreover, in the pre 2002 analysis, both panel effects variables reached significance, again signifying a difference between DDD and DDR panels. These results underscore the importance of coding decisions properly. Nearly all earlier studies adopt a coding scheme similar to Coding Scheme 1, which likely is not as accurate. As such earlier studies of the NLRB may overestimate the propensity of the NLRB to actually rule in favor of labor. A simple dichotomous measure of yes or no simply does not capture the nuances required to accurately assess how the Board actually makes decisions.

4-Prong Dependent Variable

The model presented in the prior tables used as its dependent variable a simple dichotomous measure of whether the case favored labor in whole or in part. Such a measure is quite crude, and it could mask significant variation underneath the surface. As noted previously, the NLRB renders a significant number of split decisions, and as such it may be unfair to ascribe partial decisions to always be in favor of labor. As such, I present an alternative model where I

estimate via ordered logit the propensity of the NLRB to vote for or against labor. Given the greater information in the data concerning more fine tuned selection of the data, I wanted to explore whether panel effects persist once the data is looked at in this alternative specification. In this next iteration of the model, the dependent variable has four levels: 1) pro labor; 2) leaning labor; 3) leaning industry; and 4) pro industry. Table 5 displays the results. Further, I similarly did this analysis by both ordinary least squares ("OLS") and multinomial logit and came up with the same results. I did the analysis using Coding Style 2. As before, variables such as the ALJ decision motivate decisionmaking. Panel variables are also significant in the first model, covering all case from the period 1993-2007. The inflation variable is also significant in some of the regressions. Moreover, the section 8(a)(3) variable is significant in the CA regression, with such cases being less likely to be decided in favor of labor, a result not all together surprising given that section 8(a)(3) has an intent element to it, which may allow a Board member the means to interject personal philosophy into the decision.

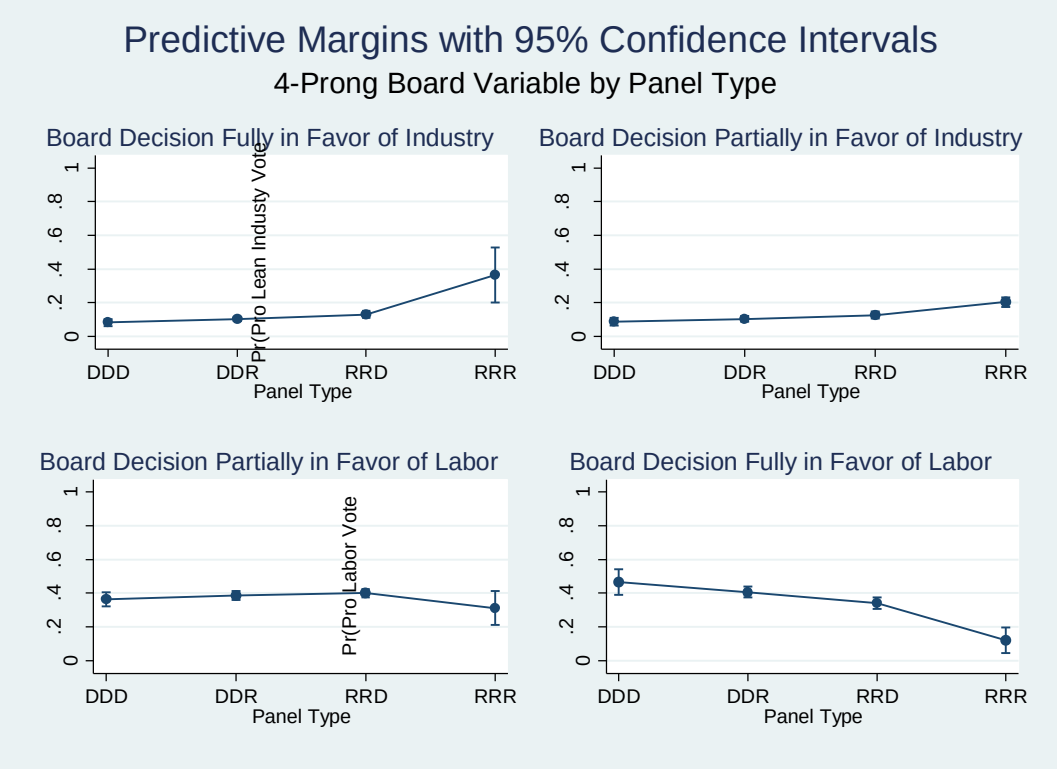
Most notably, panel effects are most evident for the most ideological decisions. For instance, looking only at the case outcome decided fully in favor of industry reveals that all Republican panels have a predicted probability of 36% to vote fully in favor of industry, whereas all Democratic panels vote in such a way only 8% of the time. Likewise, DDD panels are more likely to vote for labor in decisions found in labor's favor entirely, with DDD panels having a predicted probability of 47% voting entirely in favor of labor with RRR panels voting in labor's favor entirely only 12% of the time. If one looks only at the cases decided partly in favor of labor or industry, panel effects are much less evident; rather, the predicted probabilities for each panel type are virtually indistinguishable.

Table 5: Ordered Logit Using 4-Prong Dependent Variable: Predicting Board Ideology

	(1) All Cases	(2) CA Cases	(3) CB Cases
DDR	-0.241	-0.143	-1.029
	(0.156)	(0.156)	(0.695)
RRD	**-0.526****	**-0.409***	**-1.965****
	(0.173)	**(0.175)**	**(0.722)**
RRR	**-1.856*****	**-1.730*****	-3.640
	(0.397)	**(0.391)**	(1.945)
Clinton	0.0724	0.105	-0.506
	(0.161)	(0.165)	(0.734)
Congress	-0.343	-0.395	-0.248
	(0.439)	(0.475)	(1.840)
Court	-0.194	-0.337	1.449
	(0.178)	(0.186)	(0.794)
Inflation	-0.0122	**-0.0168***	0.0365
	(0.00671)	**(0.00699)**	(0.0298)
Pro Labor ALJ	**3.709*****	**3.777*****	**3.244*****
	(0.188)	**(0.223)**	**(0.413)**
Case Mix	-0.0100	-0.000832	-0.0950*
	(0.0102)	(0.0109)	(0.0429)
S8a1	-0.0661	-0.0657	-0.0512
	(0.155)	(0.192)	(0.860)
S8a2	-0.0202	0.0289	-0.515
	(0.245)	(0.259)	(0.955)
S8a3	**-0.485*****	**-0.481*****	-0.902
	(0.0873)	**(0.0908)**	(1.197)
S8a4	-0.235	-0.247	0.803
	(0.163)	(0.168)	(1.123)
S8a5	0.102	0.0900	1.013
	(0.0879)	(0.0908)	(0.650)
South	0.0144	0.0707	-0.649
	(0.110)	(0.116)	(0.470)
cut1			
_cons	-2.649*	-2.605*	-2.539
	(1.239)	(1.293)	(4.854)
cut2			
_cons	-1.819	-1.759	-1.651
	(1.232)	(1.286)	(4.837)
cut3			
_cons	-0.102	0.0534	-1.054
	(1.229)	(1.283)	(4.833)
N	2675	2461	214
Pseudo R	0.1542	0.1282	0.1942

Robust standard errors in parentheses; year fixed effects omitted for brevity
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Figure 24



As a final additional robustness measure, I also looked at the issue with an alternative dependent variable, breaking it down by judge vote as opposed to looking at case outcomes as a whole. In this alternative specification, we see similar results, with there remaining a large discrepancy between all Democratic and all Republican panels. It seems no matter how one measures it – using alternative dependent variables, using different independent variables, etc. – panel effects are clearly evident in Board decisions.

Limitations

The study of course is fraught with limitations. Concentrating merely on votes is overly simplistic. This is especially the case here because so many of the cases under review concerned split decisions. It may be the case, for instance, that a judge perhaps found it unnecessary to find additional violations of the NLRA because additional violation would not affect the remedy.

Moreover, a focus purely on votes risks missing a great deal of information that may be equally as important in explaining vote choice. For instance, judges may bargain with each other on how broadly or narrowly they will decide the cases, or whether they even want to write a formal decision at all. As Edwards & Livermore (2009) note, one disadvantage of a quantitative study of votes is that any such analysis cannot really account for what goes on behind the scenes. Board members, for instance, may simply affirm the ALJ decision without writing a formal opinion, whereas in other cases, with near identical fact scenarios, the Board members may write a more detailed and comprehensive opinion to serve as Board precedent. How panel composition impacts those decision is an interesting topic for further research, though it is a topic fraught with difficulty because it is near impossible to determine what factors impact how Board members actually write their decisions. There may also be more subtle forms of influence.[139] Judges sitting on panels meeting the same day may be more or less concerned with some cases as opposed to others. It is impossible to speculate the extent to which vote trading could occur. Indeed, how to incorporate "legal" reasoning to a quantifiable variable is something that is difficult to do in practice, given the realities of how judges actually make decisions. More work could be done for instance to better "control" for legal doctrine by, for instance, coding decisions concerning the specific legal issue and standard of review.

Although I tried alternative specifications to deal with the issue, potential endogeneity is also of concern. As Moe (1985) describes, the NLRB does not exist in a vacuum; it is a part of a moving and mutually adaptive chain of lower and upper level actors, each of whom has their own political preferences on how they would like labor policy to lean. How to properly incorporate the interconnecting actors into any statistical model is something fraught with

[139] *See* Kim (2009).

difficulty. Moreover, potential multicollinearity between the various independent variables in any model could cloud any assessment you might be able to make of the result. As noted above, I redid the analysis using the ALJ vote as the dependent variable and found the legal variables – namely statutory section 8(a)(1) to more significant. Thus, given that the prime motivator of Board decisions is the ALJ decision and given that ALJ decisions seem at least in part to be primarily motivated by legal considerations, it would be fair to say that studies of Board decisionmaking may in fact underestimate the extent to which legal considerations govern Board decisions.

Conclusion

In all, the results are suggestive of the fact that Democrats on panels at the NLRB behave differently than Republicans, and that the voting proclivity of a member may very well depend on the party of their co-panelists. Nonetheless, one should be cautious in making too much of these findings.[140] As shown in the time period analysis, the effect of partisanship may very well depend on the time frame under study as well as case mix factors that could impact the pool of cases before the Board. While I sought to control for those effects,[141] it is still difficult to make a direct comparison as strategic factors could play a role in influencing what kind of cases the Board hears.[142] Of course, there remains the possibility that the estimates of partisan ideology

[140] In nearly all of the regressions, the "tone" of the ALJ decision – whether in favor of labor or not – had the most substantively important impact in influencing the Board vote. It may be the case, however, that some of the political, economic and case-specific variables in the model in turn predict the ALJ's propensity to vote a certain way. As such, the model may underestimate the impact that some of these variables have on Board voting. However, the substantive impact of the findings with respect to partisanship are so strong here that even accounting for these issues would not distract from the general finding that partisanship appears to be motivating NLRB votes during certain frames. Disentangling the web of causation is a complex endeavor so any results should be taken with some caution.

[141] In other specifications, I tried alternative ways of measuring case mix. The results did not change.

[142] Although my findings have been robust with respect to different types of cases (just 8(a)(1) cases, etc.), I hope to do more fine grained analysis of case content using a textual analysis program to confirm these results.

are biased by the omission of omitted variables that perhaps correlate with ideology. That possibility is lessened by the fact that there is random assignment of cases, and I use regression analysis to control for differences in voting rates across time and place. Further, I included in the regressions controls for various case characteristics to further reduce the risk of omitted variable bias. As such, the approach used has the same selection issues that is often a critique of similar empirical studies.

Noteworthy too in the results is the fact that political variables – Congress, President and Court variables – fail to reach significance. Time and time again, the most important predictor of how the NLRB will rule is the ALJ decision. The absence of significance for these variables suggests that politicians do not directly control the actions of the NLRB. It does not appear to be the case, for instance, that the NLRB decides to be more liberal if the House changes hands from Republican to Democrat nor does the NLRB appear to be bound by the ideology of the reviewing appellate court. Rather, the impact of partisanship must be seen through the lens of the appointment process. The results in this study make it apparent why debates about NLRB's appointments are so contentious; all in all, we can expect NLRB appointees to act as partisans once on the Board, and this partisanship appears to be magnified if they by chance sit on a panel with other co-partisans. The results concerning political variables were robust to different specifications of the variables.

Indeed, particularly noteworthy is the fact how the results differ from what was found by Weingast and Moran (1983) and others who provided evidence that changes in congressional oversight influences agency action. There are several reasons, why, for instance, we may find null results here concerning the impact of political principals. Weingast and Moran studied the choice of cases by the FTC, under the assumption that the agency chooses to avoid controversy

by pursuing trivial cases or that it could promote consumerism by selecting cases that advance that goal. Here, our dependent variable is much different – we are actually looking at the content of the decisions, as the NLRB itself has little discretion whether or not to hear a case once the General Counsel actually decides to pursue charges. The choice of whether to pursue charges versus the actual outcome of a case are very different procedural postures laden with different assumptions about congressional control. In particular, as noted previously, the Board has very little choice as a legal matter in many cases. For instance, if the case concerns credibility determinations, there is little the Board can do to overturn the ALJ decision. Moreover, Weingast and Moran (and other congressional dominance scholars) do not consider how lower-level agency decisionmakers (such as the ALJ) and subsequent decisionmakers (such as the courts) impact cases. They also do not consider how legalistic factors, such as the procedural posture or the actual statute being relied on, can mediate the extent to which politics dominates decisionmaking. Furthermore, much of the research stemming from the congressional dominance school was conducted in the late 1970s/early 1980s time period.

What do these results say about the way an independent agency should act? While this issue will be discussed more in the concluding chapter, it is worth noting here that the fact that we see Board members behaving differently depending on who is on the panel may very well be how we envisioned the agency to operate. Critics of the NLRB lambast it for its supposed constant switch in doctrine upon the advent of a new presidential administration. However, while this may occur to some extent on high profile cases, for the most part, the vast majority of NLRB cases deal with routine subject matters, such as whether a given set of employees' rights were violated by an employer. Most issues coming before the NLRB happen on the microlevel rather than the macrolevel, and the court decisions emanating from the NLRB reflect this case

pattern. Thus, while there may be some shifts in doctrine on certain high profile issues, for the most part, the majority of the run of the mill employee-employer disputes are handled fairly consistently from year to year. Moreover, it is also the case that partisanship can only rear its head for certain types of cases; for instance, if the lower court case is appealed by the employer based wholly on credibility findings, there is little a partisan Board member can do about it. Since findings of fact are entitled to deference by the Board, the holding of the ALJ will stand no matter the individual proclivities of individual Board members. This perhaps is how it should be, that is, on the majority of routine cases legal issues predominate, but on more high profile policy type issues, there is some room for individual Board members to interject their personal opinion into how they decide cases. Because they are appointed by the President, Board members are in essence a reflection of the president's agenda. The system put in place specifically provides that the President have the authority to appoint Board members so it should be no surprise that Board members generally will reflect the prevailing opinion of the appointing president (or in the case of being members of the opposing party, they would be more in line with the president's ideology than others). Panel effects may then reflect a system that is working as intended.

Finally, why might we see panel effects? Given that subsequent reviewers, such as appellate courts, seem to have little impact on influencing outcomes, a whistleblowing theory to explain panel effects seems unconvincing. Rather, panel effects, at least in the case presented here, are most likely due to a collegiality norm. Moreover, it also seems to be the case that Republican panels tend to go to the extremes when the entire panel is composed of like-minded partisans. This may be because all-Republican panels do not hear or do not heavily consider opposing arguments as much as panels that have at least one Democrat on the panel. Whether

the NLBR should mandate panel diversity is a topic I consider in the concluding chapter as mandated diversity could do much to lessen the panel effects observed here.

Chapter 5: The NLRB and the Regional Appellate Courts, 1994-2009

After the Board hears a case, the aggrieved party has the option to go further and seek relief in the federal court system. As shown in Chapter 4, the ideological tone of NLRB decisions seems to be influenced primarily by the ideological tone of the lower court ALJ decision as well as by the panel composition. What happens however when the case gets appealed to the federal appeals court? Do we still see partisanship impacting the process? Do we see the same type of panel effects that appear to pervade decisionmaking on the Board? Moreover, what political and economic factors motivate how the federal appeals court rules on NLRB matters? In this chapter, we turn to answer those questions.

Appealing to the Federal Courts

As noted in Chapter 2, parties losing before the NLRB have the opportunity to present their appeal to the applicable federal appeals court based either in the region of the parties or in Washington D.C. at the United States Court of Appeals for the District of Columbia circuit. Appeals of this nature can take one of two types. First, NLRB orders are not self-enforcing.[143] If the party losing before the Board refuses to comply voluntarily with the Board's order, the NLRB, through its General Counsel, will file a complaint with the applicable appeals court to enforce the order. Second, the aggrieved party can file an appeal of the merits of the Board's ruling. So essentially, most appeals involve two separate motions: a motion to enforce filed by the NLRB General Counsel and a separate motion to review the merits of the Board's decision filed by the losing litigant. Winning on appeal is difficult. Much like the Board itself the appeals court cannot simply retry the case. The reviewing court may enforce, modify or reverse the ruling of the Board, in whole or in part, or remand the case back to the Board for further

[143] 29 U.S.C. §160(e)(1982); 29 U.S.C. §160(f) (1982).

action.[144] As a legal matter, it can only disturb the Board's ruling if they find there to be a lack of substantial evidence to support it or if it finds that the Board's interpretation of a statute to be unreasonable.[145] Pursuant to the United States Supreme Court case in *Chevron*,[146] decisions of administrative agencies are entitled to deference absent the agency acting in a matter contrary to law. As such, the legal standard by itself makes it very difficult for any party to prevail on appeal. That said, the mix of cases that ultimately get appealed are a unique batch. In most situations, cases involving minor issues or issues relevant to single employees usually settle. For the most part only the most difficult legal issues will get appealed. As a practical matter, the court of appeals represents the last chance for a losing party in their case.

Review by the court of appeals is generally governed by the "substantial evidence" standard. Under *Chevron,* the court cannot simply substitute its own judgment for that of the court if it disagrees with the court's policymaking discretion. Rather, under *Chevron,* the Court must undertake a two-step test to determine whether it, by law, must defer to the agency's interpretation of a statute. Under step 1 of *Chevron,* the court determines whether there is any ambiguity in a statutory provision and if there is, the court must then determine whether the agency's interpretation is reasonable. Moreover, in many cases, the court simply assesses whether there is "substantial evidence" to govern the agency's decision. Just as the Board could not overrule the ALJ's credibility determinations, so too the appellate court cannot try to review the factual underpinnings of the case unless it is clear that the legal judgment sought lacks a substantial basis in evidence. For instance, applied to the NLRB, appellate courts must often

[144] 29 C.F.R. §101.14 (1977).

[145] 29 U.S.C. §§151-168 (1982).

[146] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

assess whether the employer bargained in "good faith," a requirement under section 8(a)(5) of the NLRA. The factual underpinnings of that judgment, for instance, testimony about how the employer acted or what activities the employer engaged in, is something that the agency assesses. The court can only overturn the judgement if the court's overall conclusion on lack of "good faith" rests on a lack of credible evidence.

Panel Effects and the Appellate Courts

As noted in Chapter 3, there is an ever-expanding literature on the impact that panel composition has in explaining judicial votes in the federal courts of appeals. Quite simply, scholars studying a host of legal issues emanating from the federal courts of appeals have concluded that judicial votes differ depending on the composition of the panel (Kim 2009). While the results vary according to issue area, scholars studying judicial review of agency action on the federal court of appeals have concluded that panel composition motivates decisionmaking, sometimes even more so than individual preference (Sunstein et al. 2006; Revesz 1997). For instance, Frank Cross and Emerson Tiller (1998) analyzed D.C. Circuit court cases applying deference review under *Chevron* and found panel effects prevalent.

Although consensus exists that panel effects occur, scholars differ in explaining why they happen. Some contend that panel effects occur because of a deliberative process whereby internal exchanges among colleagues influence outcomes (Kim 2009). Judges, for instance, may persuade colleagues of a specific viewpoint, or there could be some sort of psychological compulsion to conform to the group's preferences. Such an account of decisionmaking is consistent with the "norm of collegiality" that exists on multi-member courts. A real "conformity impact" could also be at work, as the deliberating minds of like-minded people tend

to go to the extremes. Judges may also conform because they do not want to undertake the additional "expense" of having to spend time writing a dissent.

Another variant of this theory, developed by Cross and Tiller (1998), contends that judges use dissents to have a whistleblowing impact to signal to a higher court (or the *en banc* court of appeals) that there is a problem in the case that needs to be addressed. By whistleblowing, the dissenting "exposes manipulation or disregard of the applicable legal doctrine" (2156). Other theories rely less on internal interaction among the panelists themselves; these theories rest more on an understanding of how judges interact with other actors in the wider political system. Under this view, judges consider what ramifications their vote will have and may thus behave in a strategic fashion (Kim 2009) A judge, for instance, may fashion his or her vote taking into account how they think the higher appellate court – such as the Supreme Court – might react to the decision.

Circuit Court Panel Effects in Administrative Decisionmaking

Scholars have studied panel effects as they relate to Supreme Court and circuit court review of administrative decisionmaking. On the Supreme Court, scholars have found that more conservative judges are less likely to validate agency decisions than liberal justices (Miles and Sunstein 2006, 823). Likewise, more conservative members are less likely to validate liberal agency decisions than conservative ones, with less conservative members showing the opposite pattern. These patterns persist on the federal courts of appeals. In cases involving both the EPA and NLRB from 1990-2004, Republican appointees invalidated liberal agency decisions more so than Democratic appointees. These differences are even greater when judges sit with partisan panelists of same party (Miles and Sunstein 2006, 823). In their study, Miles and Sunstein found that when the agency makes a liberal decision, Democratic appointees are 14 percent more likely

to validate than the average Republican appointee; when the decision is conservative the Democratic judge is 19% less likely to validate than the Republican one. These partisan differences become more apparent when one considers panel composition. Democratic appointees siting with co-partisans are 31.5 percent more likely to validate a liberal decision than a conservative one; and all-Republican panels are over 40 percent more likely to validate a conservative decision. Miles and Sunstein find these results surprising. They found a gap of 40 percentage points between unified Democratic panels and unified Republican ones. The whole purpose of the *Chevron* doctrine was to impose some sense of uniformity to the process and to give a greater role to the agency to exercise its expertise in making decisions. Miles and Sunstein contend that validation should ideally not be correlated with ideology because *Chevron* was intended to eliminate such differences. The authors also found that validation rates rise from 50% when agency decision does not match ideological predisposition to over 80% when it does match. These differences are not as stark for politically mixed panels. Miles and Sunstein found there to be a dampening effect when panels are politically mixed, as the effects described above with respect to fully partisan panels are muted. In mixed panels, Democrats are 20% more likely to validate a liberal agency decision, but there is virtually no difference in validation rates for Republicans sitting on mixed panels. Republicans sitting on mixed panels are only 6% less likely to validate when an agency decision is liberal, a result that was statistically insignificant. In other words, only Democrats sitting on mixed panels experienced panel effects concerning validation of agency decisions. Miles and Sunstein found more evidence of panel effects once the ideology of the agency decision was controlled for. Miles and Sunstein are not alone in finding such effects. Williams Eskridge and Connor Raso (2010) too found that judge's ideology correlates with the deference regime applied.

Miles and Sunstein (2006) also compared validation rates with rates of liberal voting and found panel effects to be more prevalent on rates of liberal voting than for validation. Again, the authors found panel effects to be more prevalent among Democratic judges, with Republican judges showing the same rate of liberal voting irrespective of how many Democrats joined them on the panel. For the NLRB cases, however, Miles and Sunstein found that Democrats showed the same rates of liberal voting no matter how many Republicans sat on the panel. The authors opined that this may be the case because Democratic judges may have such strong convictions with respect to labor making them more willing to dissent from the colleagues.

Other scholars also studied the issue with respect to appeals court deference to administrative agencies. Cross and Tillman (1998) studied appellate court's application of *Chevron* deference to administrative agency decisions to question whether courts deferred to the agency. The authors found that panels dominated by members of the same party were far more likely to implement partisan implications of judges than split panels. In other words, heterogeneous panels tended to make "better" decision, assuming you mean "better" to mean application of doctrine to facts. They explain this phenomena by arguing that the presence of so-called whistleblower impacts outcomes because the majority gets subconscious about reversal forcing the panel to pay more attention to obey legal doctrine. Yet, still other scholars have found contrasting results when analyzing court of appeals decisions emanating from administrative agencies. Revesz (1997) studied procedural challenges to EPA cases and found no partisan impacts; for *Chevron* issues, he found that the court decided appeals without regard to ideological preferences.

Appealed Cases

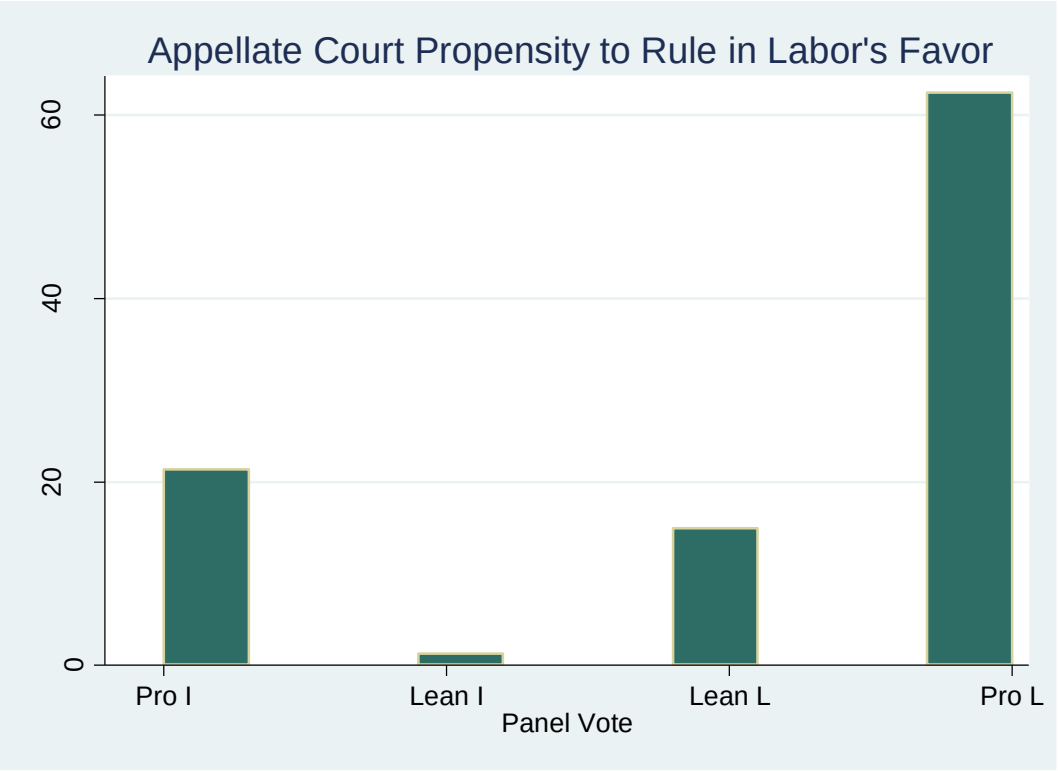
The present empirical study is two-fold: first, the study is intended to provide empirical information on what happens to NLRB cases that gets appealed. Only by understanding the empirics of what happens can we begin to discuss normative implications. Second, the study is designed to test empirically whether and to what extent panel effects exist on the federal court of appeals in their review of NLRB cases and if so, how panel effects on the regional court of appeals differ from the panel effects prevalent on the Board itself.

The dataset contains 435 cases during the period 1994-2009 appealed to the federal appellate courts. Of these cases, the appeals court ultimately ended up deciding 78% of them in favor of the labor litigant with 22% being decided in favor of industry.[147] The case can be broken down further using alternative coding schemes. In the first coding scheme displayed in Figure 25, I coded cases depending upon whether the ruling is in whole or in part decided favorably for labor ("Coding Style 1"). I eliminated approximately 5% of the cases after reading them because the case involved a legal issue not applicable to an unfair labor practices disputes under section 8(a) or section (b) of the NLRA. For instance, I eliminated cases if the case dealt with whether the complaint was time barred or whether the court had personal or subject matter jurisdiction over the dispute as these issues rest on unique legal options that do not implicate the court's decisionmaking with respect to unfair labor disputes. Moreover, I also eliminated cases dealing with more tangential issues, such as appeals concerning the award of backpay. Of the remaining cases, as shown in Figure 25, 21% were decided solely in favor of industry, a surprising statistic given that the percentage at the Board was more in the line of 17%. Just

[147] If the court remanded a case, I coded the decision in the ideological direction of the court decision. In most cases, the court remands with instructions to the Board so it is quite easy to tell which ideological direction the court leans.

under 1% leaned industry while 15% leaned labor. About half of the cases were decided wholly in favor of labor.

Figure 25

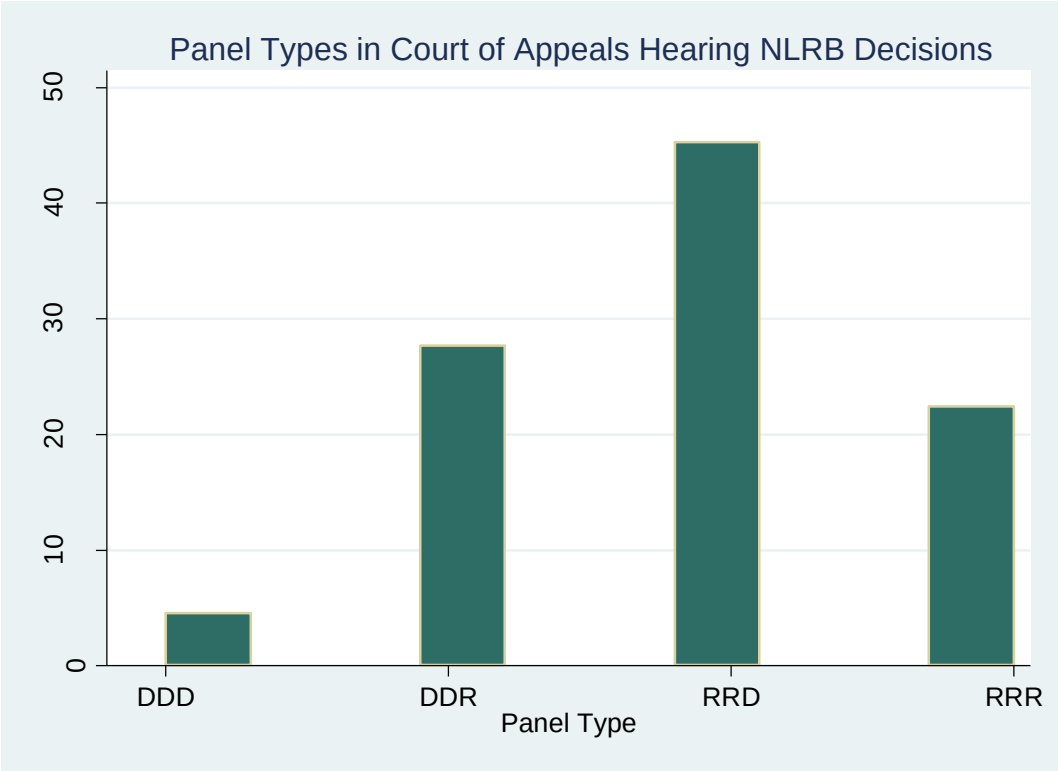


In the alternative coding ("Coding Style 2"), I looked at which party actually challenged the court decision. I reviewed carefully the legal reasoning of the case and I looked to what party filed an appeal of the case to try to get a better understanding of the side that the court was actually coming down on. The results evidence a similar pattern to above. Under this alternative scheme, the appeals court decided about 63% of cases wholly in favor of labor, with an additional 10% leaning in favor of labor. Likewise, a slightly higher percentages of cases – 26% - were decided solely in favor of industry in whole or in part. The increased allocation of cases to one side or the other (industry or labor) occurred because by reading the cases closely and

seeing exactly what provision was being challenged enabled me to get a better sense of what side the court ultimately came down on.

I then looked at the propensity of the court to rule in favor of labor by panel type. The breakdown of panel types is very different in the court of appeals than it was for the Board, as shown in Figure 26. Unlike the Board, the DDD panel type is a distinct minority in the appellate courts with less than 5% of NLBR decisions being heard by DDD panels. Moreover, RRR panels are much more common than they were for the Board, with 22% of cases being heard by all-Republican panels. Mixed panels are the norm, with most of the panels being Republican majority (45%) than Democratic majority (28%).

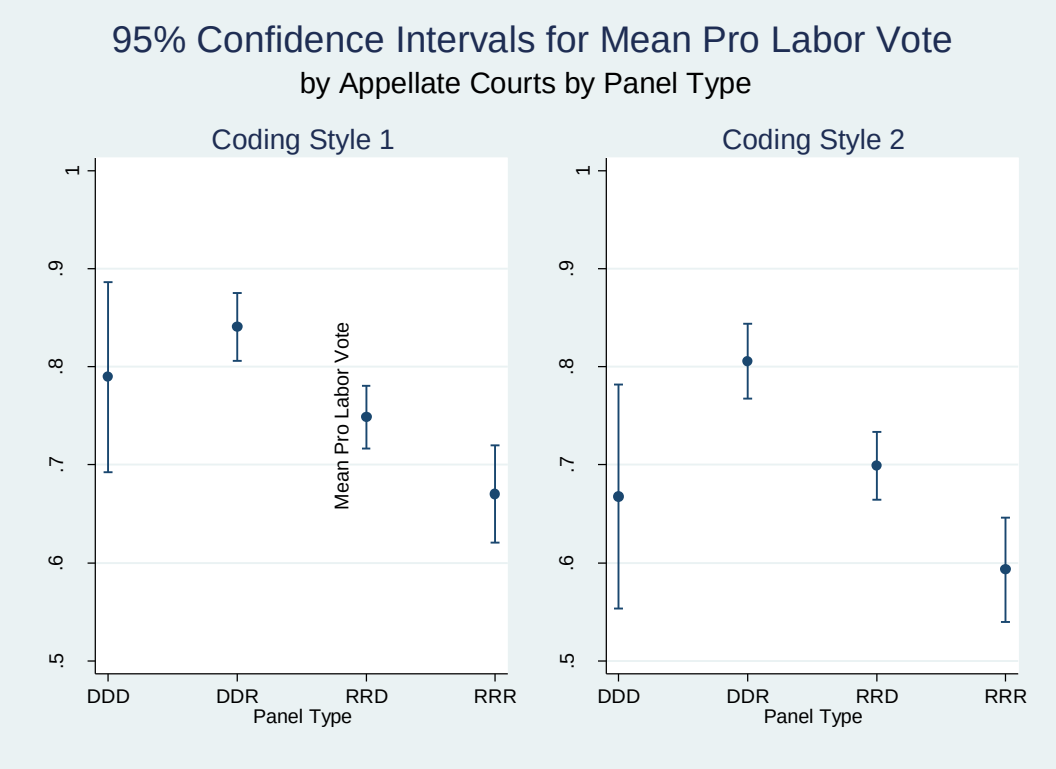
Figure 26



Under Coding Style 1, looking at whether the court voted in favor of labor in whole or in part, all-Democratic and mixed party panels vote at fairly similar rates in favor of labor as shown

in Figure 27. Interestingly, as shown in Figure 27, DDR panels show greater pro labor voting (84%) than DDD panels (79%) as well as more than RRD panels (84% v. 75%). Majority Republican panels vote similarly to DDD panels (75% v. 79%). There is a noticeable jump downward for RRR panels, who vote in favor of labor 67% of the time. This is a higher rate than we saw for all-Republican panels at the Board, though the results are still within the margin of error. Moreover, because the margin of error for DDD panels is so large, although DDD panels vote in favor of labor 79% of the time, the outcome comes within the margin of error for RRR panels. Using Coding Style 2, we see a similar trend, but with a clearer difference between DDR and RRD panels (81% v. 70%). The addition of one Democrat to an otherwise Republican panel then appears to somewhat bias results in a more liberal direction. The breakdown is the same when limited to CA only cases. Moreover, the breakdowns are similar when one analyzes each statutory section (i.e., section 8(a)(1), etc.) separately.

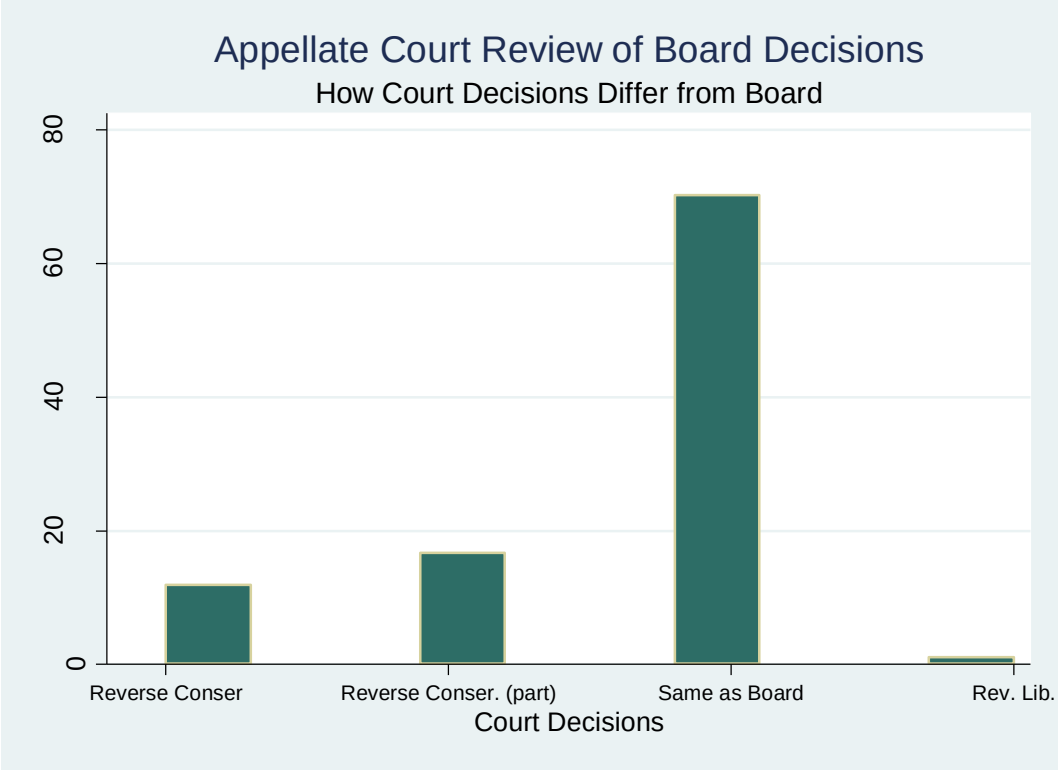
Figure 27



Overall, the federal appeals court upholds a majority of the Board cases, though for about 30% of cases, the court's decision differs from that of the Board. As shown in Figure 28, in over a quarter of cases, the courts overturn the Board in a more conservative direction. In 12% of cases, the courts completely reverse a fully liberal Board decision and in still another 16% of cases, the courts will rule against the pro labor party in part. Courts are much less likely to overturn a conservative Board decision, as less than 3% of cases come out in a more liberal direction than the Board decision. The takeaway from this is startling: essentially, if the losing party hopes to overturn a conservative court decision, it faces a stiff challenge in the courts of appeals because the courts hardly ever rule in a more liberal direction than the Board. That statement should be taken with caution, however, because so few conservative cases are even appealed to the federal courts in the first place, as only about 13% of the cases heard before the

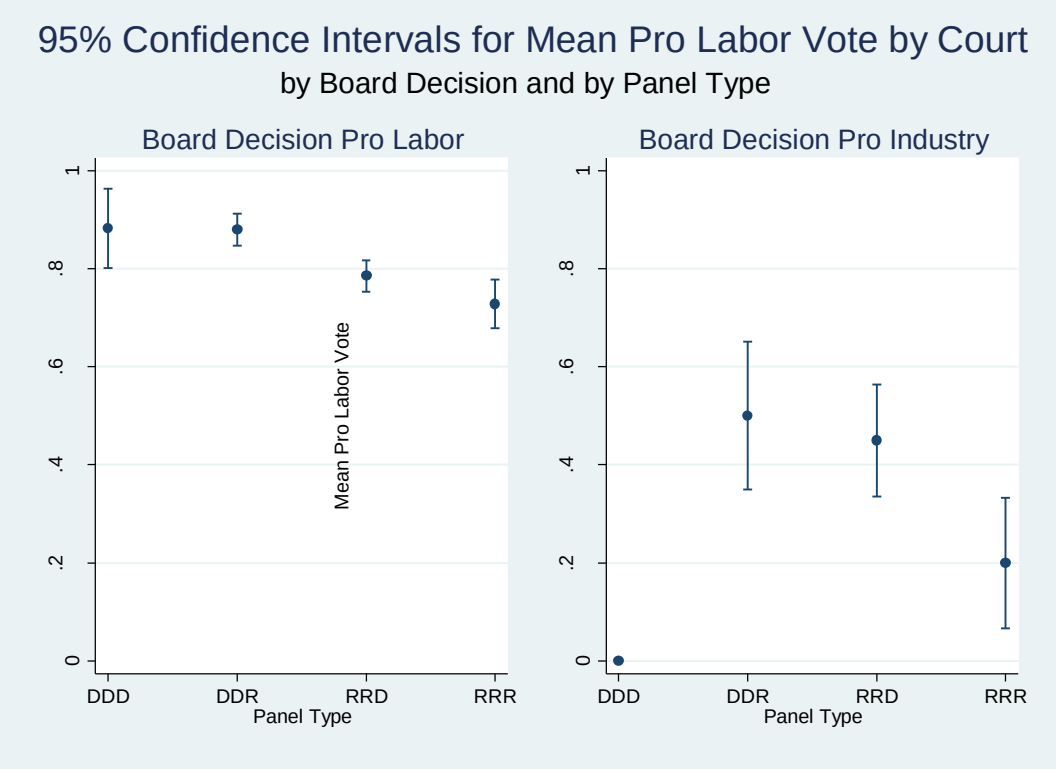
appellate courts are ones where the Board ruled in a conservative direction. The high number of pro industry rulings is not surprising because oftentimes only the most difficult legal issues make their way up through the federal appeals court process and it may be the case that only employers have the money, time and resources to appeal. Moreover, the federal appellate judiciary has a mean ideology score that is more conservative than the mean ideology of the Board so it should be no surprise that the decisions lie somewhat more in a conservative direction. This pattern continues irrespective of the type of case. A vast majority of the cases appealed are CA cases (523 cases), and the percentages based only on CA cases are exactly the same as percentages based on both CA and CB cases. The rates of winning for CB cases are slightly less as 76% of cases are decided the same way in the appeals court as before the Board.

Figure 28



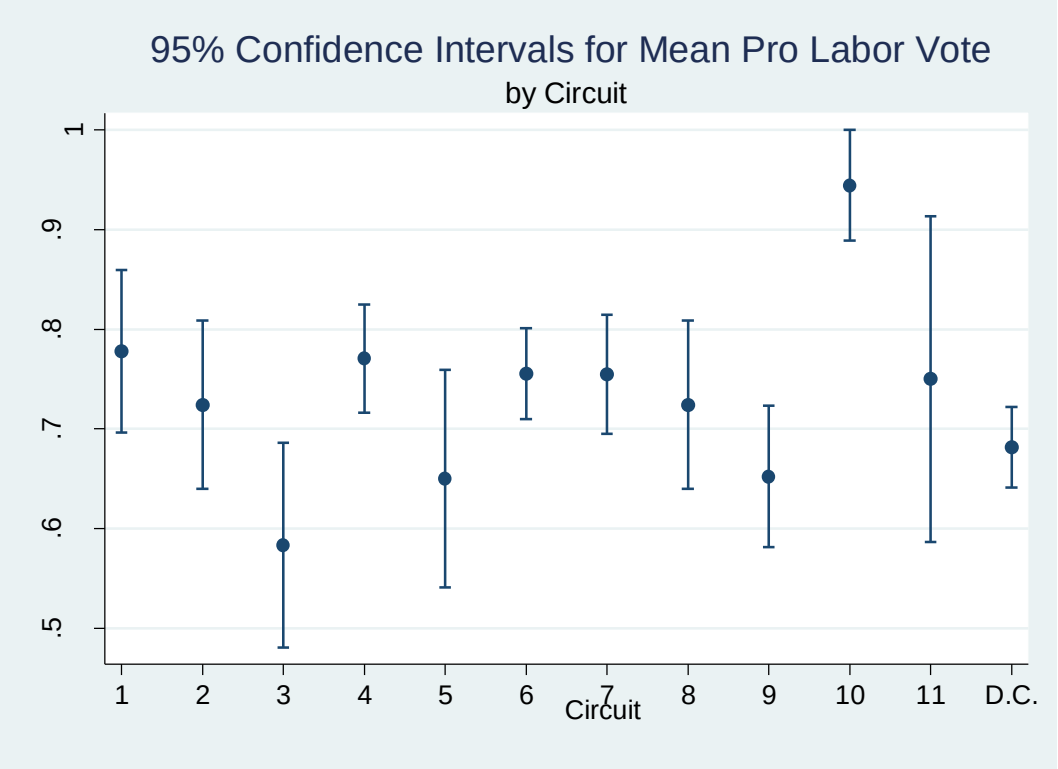
Looking at the data broken down by the tone of the Board decision, panel effects appear, as shown in Figure 29. Using Coding Style 2, one sees that there is a difference between DDR and RRD panels, although the panel effects are not as extreme as they were before the Board. Panel effects are more evident when the Board decision is conservative. Only 2 DDD panels heard conservative Board decisions, which they affirmed, so the "0" score there must be taken with a grain of salt. Mixed partisan panels voted about half the time in a pro liberal direction; again, these results should be taken with caution as there were only 15 cases in total where mixed partisan panels voted in a more liberal direction than Board. This may also simply be the result of the fact that so few conservative Board decisions get appealed.

Figure 29



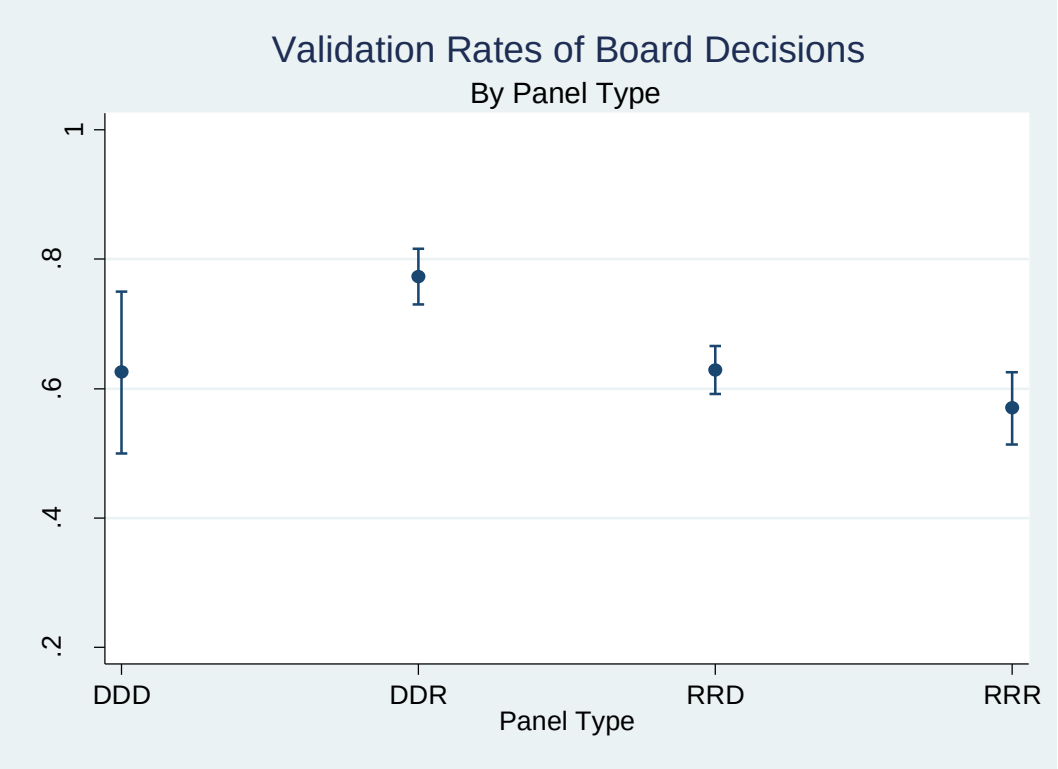
Further, we see noticeable differences among circuits. Different circuits rule in favor of labor at different rates. As noted in Figure 30, circuits like the 3rd, 5th, 9th, and the District of Columbia Circuit ruled in favor of labor between 59%-65%. Other circuits like the 1st and 2nd Circuit were more liberal, ruling for labor almost 80% of the time. This result is not unexpected. Scholars have found there to be quite a variation among circuits, with certain circuits, such as the 4th circuit, having a reputation for being more conservative. Nogalas et al. (2008) found in their asylum study that in one circuit, Democratic appointees remanded cases at twice the rate of Republican judges. Moreover, applicants in the 7th Circuit have a 700-800% greater chance of prevailing in their appeal than applicants from any of the other three Southern circuits.

Figure 30



Finally we also see panel effects when we look at validation rates, that is, the propensity of the court to affirm the lower court ruling. As shown in Figure 31, in CA-cases filed against employers, all-Democratic panels vote in a liberal direction to validate the Board decision about 65% of the time, whereas RRR panels vote in favor of validation 57%. Moreover, mixed partisan panels evidence noticeable differences in validation rates, with DDR panels affirming 77% while RRD panels affirming 63% of the time, with the differences being statistically significant.

Figure 31



The conservative tendency of the federal judiciary would suggest that we should similarly see partisan panel effects impacting how the federal courts rules on NLRB matters. Looking at the court decisions in a dichotomous matter (favor labor or not), partisan panel effects are evident. Compared to the Board's panels, there is a greater chance a litigant will face an all-Republican panel as over 20% of the panels involved in the cases under study comprise RRR judges. By contrast, all-Democratic panels are a distinct minority, with only under 5% of cases being decided by DDD panels. All told, panels at the court of appeals are more likely to be dominated more by Republican judges rather than Democratic judges, as compared to the panels at the Board. Naturally, we would expect this difference to have an effect in impacting how the court ultimately rules. In all, majority Democratic panels (DDD) rule in favor of labor 67% of

the time while all-Republican panels (RRR) go in labor's favor about 59% - a 8% point difference that is a far cry from the large difference seen with Board panels. Panel effects are mixed panels are also a little less obvious. DDR panels actually rule in favor of labor more than DDD panels at 80% and RRD panels rule 69% of the time in favor of labor. Moreover, as shown in Figure 31, panel effects concerning validation rates are also evident.

Multivariate Analysis

Next we turn to making a more detailed assessment of two aspects of court decisionmaking, namely, whether panel effects invade decisionmaking at the court of appeals on cases emanating from the NLRB as well as an assessment of what factors impact the propensity of the appellate court to rule for or against labor or to find that the NLRB's ruling to be lacking in evidence. It can be difficult to untangle the multiple variables that could be impacting the analysis. While there has been some analysis of NLRB votes on the court of appeals, most of the work is somewhat dated and does not include many variables that could impact the analysis. James Brudney and Deborah Merrill (2001) analyzed 1100 labor decisions and concluded that Democratic judges were significantly more likely to favor the labor litigant in unpublished cases. They also found that appellate court judges who represented management in their prior careers were more likely to rule in favor of supporting union legal precedents. The authors advance the theory that knowledge of the innerworkings of the NLRA may predispose them to have "greater judicial respect" for its "doctrinal scope." Likewise, Miles and Sunstein (2006) analyzed in part some NLRB appellate court cases and concluded that panel effects were muted with respect to court validation of NLRB decisions.

As with the earlier analysis on the NLRB, I hypothesize that the court will rule in a more labor friendly direction the more Democrat judges there are on the panel. Likewise, I would

estimate that court decisions would be more conservative in all-Republican panels than all-Democratic or mixed partisan panels. I would expect the same to be true with respect to validation rates.

Dependent Variable

As with the earlier analysis, the dependent variable in the first iteration is the dichotomous variable consisting of cases decided in favor of labor. I proceeded to estimate the following equation:

$$Y=\beta_0 + \beta_{1i}X_i + \beta_{2j}X_j + \beta_{3k}X_{k+} \varepsilon$$

Where β_{1i} indicates categories of variables concerning political characteristics, β_{2j} indicates categories of variables indicating case considerations and β_{3k} indicates economic variables. I expect that the β coefficient on the three panel dummy variables to be positive. I would also expect that the β for the Board decision to also be positive, indicating that as the Board decision is more liberal so too will the appeals decision be liberal.

I likewise coded the dependent variable two separate ways, one in which I followed the convention of other scholars and simply coded it as pro labor if any part of the case was in favor of labor. As with the NLRB analysis, however, I also coded this variable an alternative way to capture the fact that the actual party that appeals the place has an impact in determining how the court will ultimately rule. If, for instance, the General Counsel of the Board mounts a case to enforce an order, and the losing party follows a cross petition challenging the order, the ultimate outcome of the appellate court case rests on the precise legal grounds by which the court rules. As with the NLRB analysis, in an alternative specification, I also did a further analysis of the alternative dependent variable that was coded in four prongs: pro industry, lean industry, lean labor and pro labor, the latter of which would be "on" if the appellate court decided the case

wholly in favor of labor. I rest the analysis solely on the CA cases filed by labor against employers; there were only a few dozen CB cases in total in the dataset that were appealed and in many cases the CB cases were further eliminated from the dataset because the legal issue involved one that cannot be fairly said to be decisive of whether or not the Board correctly balanced the evidence in finding a violation of the law.

Key Independent Variable: Panel Type

Like the NLRB study in Chapter 4, I had three variables that measured panel effects (DDD, DDR and RRD), with RRR being the reference category this time (in the earlier analysis DDD was the reference category for the Board). I measure appeals court ideology using the Epstein et al. (2007) database of appeals court common scores. I divide up the panels in two alternative specifications. In one specification, I divide up the panel depending upon the party of the nominating president and allocate each panel accordingly. In another specification, the one that is reported here, I divide up the panels based on the Epstein scores, with scores below 0 signifying Republican or conservative judges, coding each judge for party and then constructing the panel variable with four types: DDD, DDR, RRD and RRR. In almost all cases, the two measures matched and there was no discernible difference in the results.

Independent Variables

I rely on many of the same independent variables as with the NLRB analysis, so I will not reiterate a lengthy description of them here again (see Chapter 4). I change the time period of reference, however, so instead of using, for example the median ideology of the relevant congressional oversight committee at the time of the Board decision, I instead use the ideology score at the time of the appellate court decision. I use the following variables that I previously used in the NLRB analysis: Presidential variable (dummy variable for Clinton presidency),

Congress variable (NOMINATE score for oversight committee), inflation rate,[148] number of cases, statutory section challenge and region where the case originated from (hypothesizing that cases from the South may be less liberal).

I also used a score to measure the impact that the United States Supreme Court would have on decisionmaking. Although review by the Supreme Court is highly likely, it is still important to include the variable as a control. Moreover, the appellate courts often look more to the Supreme Court for guidance so they may be more motivated by the Supreme Court than the NLRB would be, where Supreme Court review would be highly unlikely given the number of cases heard annually by each individual NLRB Board member. In another specification, instead of the Supreme Court ideology, I used the ideology of the overall circuit court.

Also instead of using the ALJ case to capture the lower court opinion, in this instance, I use the Board decision and assess the tone of the decision as to whether it is supportive or not supportive of labor. I also added some specifications where I include both the Board and the ALJ as variables; although there could be some multicollinearity in the models by including both, I found that the models had extra robustness with both variables in the model. The coding style for the Board decision (Coding Style 1 v. Coding Style 2) matched whatever coding style I adopted for the particular issue under study in the appellate court.

The analysis also includes some new variables. For instance, as Sunstein et al. (2004) found, there are significant party differences vary across circuits, with the 3rd, 5th and 7th circuits having small party effects (less than 8) with the 9 circuit having large party effects (27%) in voting behavior. Moreover, any lawyer will advise that circuits have reputations for being more or less liberal or conservative, with the Ninth circuit being touted as unusually liberal and some

[148] I also try the unemployment rate in some regressions as a substitute. There is a high degree of multicollinearity between inflation and unemployment.

of the southern circuits, namely the 4th, 5th and 11th circuits being seen as more conservative (Ying 2009; Fischmann 2009). As such, I included circuit court fixed effects.

I also included some additional case specific factors that could impact the analysis. I relied for purposes of this analysis on all decisions. Each circuit has different rules on whether or not they publish decisions and what types of decisions they publish, with rule varying from circuit to circuit. Moreover, whether or not the opinion is published could be subject to strategic concerns if a judge does not like the outcome of a case (Kim 2009, 1351). As such I coded decisions as to whether they were published or not. Oftentimes the courts will issue a summary order affirming the case. I excluded such data from the analysis. In most of these cases the court is not really deciding the cases on the merits. Technically, the NLRB has to formally file a motion in court to have its order enforced (assuming the parties do not voluntarily do what the court ordered). As such, many, if not most, of the cases heard in the courts of appeals involve summary review of these enforcement decisions. I limited the analysis to cases in which one of two things were present: 1) the losing party filed a petition for review and the General Counsel filed a cross motion for enforcement; or 2) the General Counsel moved for an order of enforcement and the court issued a decision that was longer than a page. Since the present analysis seeks to explore how judges rule, it makes sense to limit the cases to only those in which judges are actually carefully considering the Board decision and exercising their judgment in whether or not to uphold the decision.

I also considered other factors but opted not to put them in the regression tables, as they proved not to be significant. Moreover, as an empirical matter, their potential influence on case outcome is trivial. For instance, whether or not amicus curaie briefs are filed is often a variable considered in analysis. However, in this dataset, amicus briefs were just a handful of cases

where amicus briefs were filed, and most of those cases hailed from the 5-member Board, whose decisions were excluded from the dataset.

Statistical Analysis

The results are presented in Table 6 and Figure 32.[149] The analysis seems to confirm what we saw in the earlier analysis: that is, there appear to be discernible panel effects in the courts of appeals especially comparing Democratic and Republican courts. There is a clear difference between RRR panels and RRD panels, with predictive probabilities of 53% and 73%, respectively. Most notably, there is an almost 30 percentage point difference between RRR and DDR panels, evidencing how homogenous panels may go to the extremes to vote in a specific ideological direction. Interestingly, DDD panels appear even less likely to vote in labor's favor than mixed partisan panels, but the result there should be taken with caution as the margin of error for DDD panels is so large. Moreover, the results for the DDD panels may be driven by the fact that about half of the DDD panels come from either the District of Columbia Circuit or the Ninth Circuit, which despite its liberal reputation, the Ninth Circuit seems to vote more heavily against labor than other circuits. As such, the dynamics on those courts, especially that of the D.C Circuit, may be very different than judges on other circuits. Importantly, however, it appears to be the case that panel composition alone is not the sole motivating Board decisionmaking; rather, legal considerations, such as the opinion of the Board, play a strong role in determining whether or not the appellate court will rule in favor of labor or not. Moreover, the Congress variable also shows up as statistically significant at the 90% confidence level. This result is surprising, given that federal judges are nominated by their state senators for life and there would be no reason to expect that they would feel beholden to the ideology of committee.

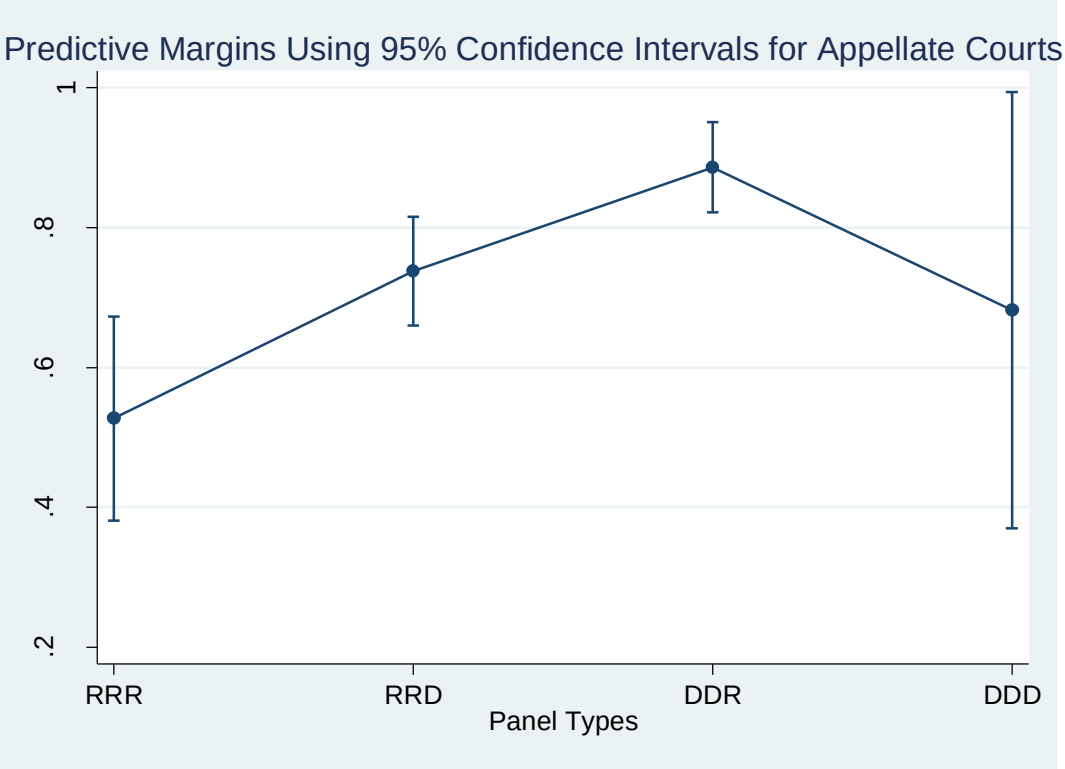
[149] Figure 32 was constructed using Coding Style 2.

Table 6: Logit Regression: Predicting Appellate Court Ideology

	(1) **Coding Style 1**	(2) **Coding Style 2**
RRD	0.703	**0.928***
	(0.359)	**(0.361)**
DDR	**1.935*****	**1.943*****
	(0.491)	**(0.466)**
DDD	1.263	0.654
	(0.828)	(0.814)
Clinton	0.353	0.332
	(0.519)	(0.503)
Congress	**-6.388***	**-5.817***
	(2.539)	**(2.722)**
Supreme Ct	-0.658	-0.677
	(1.056)	(1.077)
Inflation	0.0325	0.0318
	(0.0199)	(0.0195)
Pro L Board	**2.745***	**1.916****
	(1.196)	**(0.597)**
# of cases	-0.0188	-0.0103
	(0.0409)	(0.0460)
S8a1	1.192	1.279
	(0.618)	(0.686)
S8a2	0.920	1.530
	(1.040)	(0.996)
S8a3	0.140	-0.228
	(0.323)	(0.297)
S8a4	0.771	1.029
	(0.806)	(0.821)
S8a5	0.333	0.207
	(0.330)	(0.309)
South	0.0314	0.0333
	(0.390)	(0.368)
Unpublished	1.4323	1.554
	(0.64)	(0.912)
_cons	-8.199	-7.367
	(4.219)	(3.814)
N	397	397
Pseudo R	0.1038	0.0852

Robust standard errors in parentheses, year fixed effects deleted for brevity
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Figure 32



These results persist using other specifications and alternative codings of variables. They also persist with lags of some of the economic variables and with substituting alternative variables in (like substituting unemployment for inflation). Moreover, the results also persist when I looked at the data at the judge-level rather than the panel level. My results at the judge level were similar to the present results, with the Board outcome and panel types motivating outcomes. I also did a specification using circuit composition fixed effects, following Hall (2009, 2010), and came to similar results of no panel effects. Although there is some debate on whether judges in the circuit courts are actually randomly assigned (Hall 2009, 2010), I nonetheless leveraged the fact that random assignment occurs to just compare rates of liberal voting by panel type, and found there to be noticeable differences statistically. The results are the same as well if I limit the analysis to just published or unpublished cases, respectively.

Finally, these results persisted when I used court validation as the dependent variable (1=affirm Board, 0=not affirm Board). Using this alternative variable, I continued to find panel effects, with DDR panels voting to affirm 78%, while RRD panels validating at a rate of 61%, with the other variables held at their means. RRR panels had a predicted probability even lower at 49%, similar to the rate of all-Democratic panels (54%).

As with the NLRB cases, I also did a specification where I did an ordered regression analysis using the four pronged variable with split decisions. The results are presented in Table 7. The results are very similar to the dichotomous analysis. Moreover, I got the same results doing both a multinomial logit model as well as an ordinary least squares ("OLS") model. When the court rules in favor of industry in whole, RRR evidence a predicted probability of 36% compared to only 10% for DDR panels. Likewise, where the court rules wholly in support of labor, RRR panels have a predicted probability of 41% versus 79% for DDR panels when all other variables are held at their means. RRD panels vote 61% in favor of labor when the court decision is entirely in favor of labor, when the other variables are held at their means. I graph the predicted probabilities for those two case outcomes in Figure 33.[150] All in all, the results underscore the importance of panel composition in impacting court votes. As with the Board analysis, the ideological tone of the Board decision is also statistically significant as is the inflation. Moreover, case specific variables, such as whether the case concerned a section 8(a)(1) allegation and whether the decision as unpublished or not, were also significant.

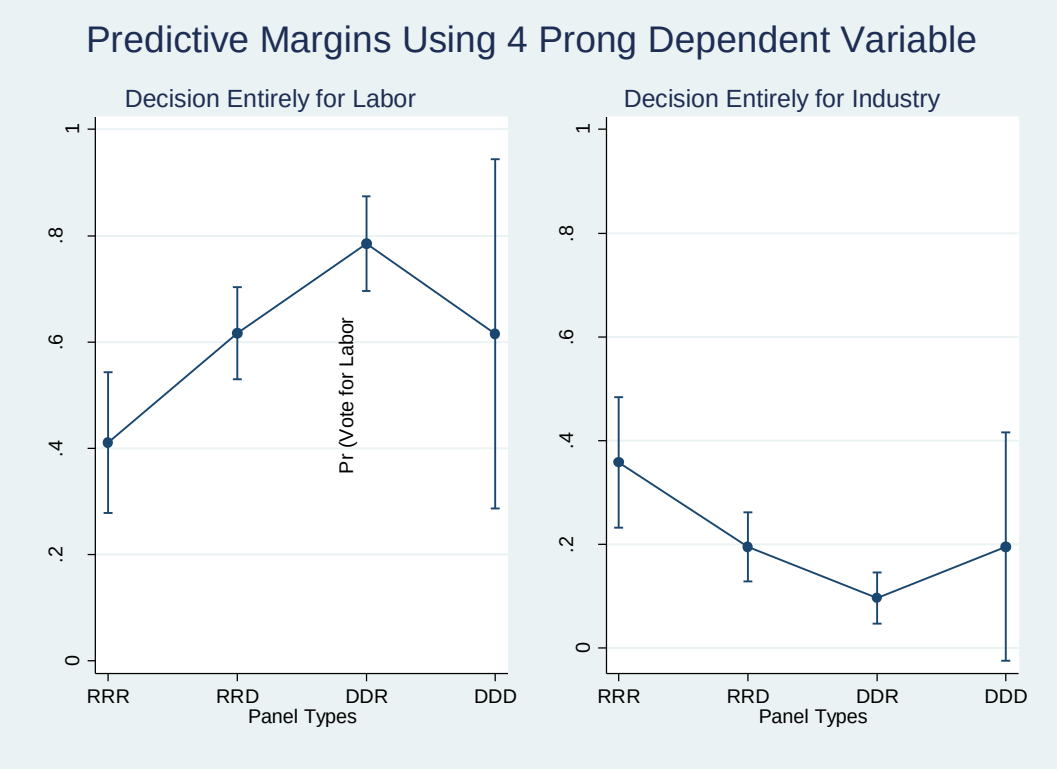
[150] I do not graph the predicted probabilities for the split cases. There were only a few "leaning" industry cases so they dropped out. When the case outcome is "leaning labor" (as opposed to being entirely for labor), the predicted probabilities are 12%, 19% and 23% for DDR, RRD and RRR panels, respectively.

Table 7: Ordered Logit Using 4-Prong Variable: Predicting Appellate Court Ideology

	(Pro Labor)
RRD	**0.835***
	(0.329)
DDR	**1.657*****
	(0.405)
DDD	0.830
	(0.776)
Clinton	0.793
	(0.426)
Congress	0.643
	(0.245)
Courthouse	-3.281
	(1.928)
Supreme Ct	-0.880
	(0.860)
Inflation	**0.0404***
	(0.0180)
Pro L Board	**1.312***
	(0.526)
# of cases	0.0143
	(0.0381)
S8a1	**1.376***
	(0.666)
S8a2	0.398
	(0.596)
S8a3	-0.281
	(0.269)
S8a4	0.274
	(0.539)
S8a5	0.452
	(0.273)
South	-0.112
	(0.294)
Unpublished	**11.89*****
cut1	
_cons	8.414*
	(3.459)
cut2	
_cons	9.361**
	(3.466)
N	394
Pseudo R	0.0510

Robust standard errors in parentheses; year and circuit fixed effects omitted for brevity
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Figure 33



Limitations

One major caveat to the analysis is the small sample size. In order to really analyze panel effects, one should look over a broader time span so as to have a larger pool of cases. Moreover, for consistencies sake, I wanted to keep in the study the same types of cases (that is, cases that are litigated unfair labor practice disputes on the merits) that were heard before the Board. As such, I eliminated cases like motions for summary judgment or cases dealing with legal issues like personal or subject matter jurisdiction. There is always a tradeoff between consistency and comprehensiveness, so perhaps in the future more types of cases should be included in the analysis to get a bigger picture of how appellate courts make decisions.

Moreover, the results for DDD panels are somewhat perplexing. Looking into the data deeper, however, reveals that there were less than 20 DDD panels in total and most of those

panel type were from the 9th or D.C. Circuit. The D.C. Circuit judges, given that the judges work in the same building everyday, may behave in a more collegial way than judges on other circuits. Indeed, half of the DDD panels from the D.C. Circuit voted wholly in favor of industry. D.C. Circuit judges also hear more NLRB appeals (and administrative law appeals generally) more than any single circuit court judge so they may have more familiarity with the material. The numbers here are too small to say definitely, but the fact that so many of the DDD panels come from the D.C. Circuit could be clouding the results. Moreover, many of the DDD panels come as well from the 9th Circuit. Despite its liberal reputation, of all the circuits, the Ninth Circuit evidences less liberal voting on NLRB matters than many other circuits. As such, it may be that a certain set of judges on the 9th Circuit have a different view toward labor than is typical of Democrat appointees and that could be impacting some of the analysis here.

There are also many other limitations as well. In the first instance, there could be endogenity in the data, as certain groups may appeal more to certain circuits friendly to their claims. Moreover, given that there is a "mutually adaptive mechanism" (Moe 1985) at work between the initial filing decision, the Board and the courts, it can be difficult to tease out the exact causal mechanism. However, the panel effects here are so strong, that no matter the specification, they would likely show up to some extent.

Conclusion

Similar to what we found on the Board, the partisan composition of the panel appears to animate cases just as much on the court of appeals as it does on the Board. Quite simply, RRR panels appear to behave very differently than mixed partisan panels, lending support to the argument that homogenous panel go to the extremes. It is difficult to say that all-Democratic panels behave the same way because the sample size here is small and the margin of error is large, but at the very least, we can say that the more Democrats there are on mixed panels the more likely the court is to rule in favor of labor. These results persist when we look at validation rates, that is, the propensity of the court to affirm or not affirm, the Board also shows noticeable differences between panel types, with mixed partisan panels voting to affirm at a higher rate than RRR panels. Moreover, panel effects appear to be even more of a motivating factor than the Board decision itself, which is troubling. The Board variable only shows up as statistically significant at the 90% confidence level and as a substantive matter, its influence is muted as compared to the panel type. Quite simply, the random choice of panel generally motivates outcomes even controlling for a host of economic, political and legal factors. In Chapter 7, we will explore what implications this has for our democracy and whether there needs to be reform of the system.

Chapter 6: Statutory Interpretation from the Agency Perspective

One of the main tasks of the Board in interpreting the NLRA is to engage in statutory interpretation. The Board, in essence, engages in some form of statutory interpretation every time it adjudicates a case; it must decide whether any given fact scenario fits within the violations set forth by the NLRA. Most of these cases, however, fit into predictable fact patterns that the Board can easily look to past precedent and apply. Most interesting, however, is to try to understand how exactly the NLRB newly construes statutes and what interpretive methodologies it uses to understand cases. Indeed, except for one or two scholars, we know very little about how *any* agency actually interprets statutes. In a recent law review article, Jerry Mashaw (2013) of the Yale Law School called on scholars to begin the quantitative study of statutory construction by administrative agencies. This chapter is intended to take on this challenge by looking at the statutory construction techniques employed by the NLRB during the Clinton and Bush years in unfair labor practice cases.

Statutory Interpretative Methodologies and Canons

Theories on how judges should construe statutes have received considerable attention. The issue of statutory construction is often highlighted during Supreme Court confirmation hearings when Senators grill prospective justices on the statutory methodologies they will use to interpret cases. How a statute is construed is often critical to the outcome of a case; a narrow construction of a given term could foreclose relief to the plaintiff while a broad construction, relying on a full arsenal of materials like legislative history to back it up, could result in a decision in the opposite direction.

Three competing theories of statutory construction dominate debate (Gorman 2009). The first theory, textualism, popularized by Justice Antonin Scalia, purports to interpret statutes

by looking at the text's literal meaning. Another view, purposivism, focuses more on interpreting the statute by looking at the overall purpose of the statutory scheme. The third view, intentionalism, focuses more on Congress's intent and how what Congress says fits in with the statute's purpose.

Textualism

As noted, textualism places an emphasis on the statute's text, looking only to find some "objective meaning." Textualists reject reliance on extraneous resources, including legislative history. In their view, what Congress did or did not say is simply irrelevant as the plain meaning of the text predominates over any sort of external document. Textualists believe that adherence to the text and to the text alone is paramount because to say otherwise would interject subjectivity into the process. Textualists dismiss the role of the legislative process as a resource to discern statutory meaning. Proponents of a given view, for instance, could pick and choose what piece of legislative history to use to advance an argument. Moreover, textualists think that it is near impossible to discern any singular "legislative intent" given the multiplicity of political actors involved in a statute's construction.

Textualism is not without its problems. Words can have multiple meanings and dictionaries can have multiple definitions, with no clear direction on how to interpret the statute. Skeptical views of legislative purpose often signal skepticism toward the aims of the administrative state with courts unwilling to concede that relating to the broader economy would be appropriate for discerning statutory meaning (Sunstein 1990).

Purposivism

The second approach, purposivism or dynamic interpretation as popularized by William Eskridge (1994), recognizes the role that the text plays but argues that courts should apply laws

dynamically, by looking at how the statute deals with real-world problems. Purposivists defer more to the views of the democratically-elected branches, placing more emphasis on democratic accountability. Dynamists elevate courts to be the primary arbiters of how the law should be interpreted with the emphasis on reliance on evolving legal principles as well as changing social and economic changes. As such, the interpretation given by a dynamic court could conceivably differ much from what the enacting coalition might want. Such an approach can foster greater judicial autonomy because courts have the power to elevate their own policy preferences ahead of the preferences of the original enacting coalition. Moreover, the current system of government makes it very difficult for another principal – namely Congress – to take any action to override the interpretation of a statute given by a dynamic court (Brudney 2003). It simply takes too much time and there are many obstacles and collective action problems in the way to overriding an adverse Court decision.

Intentionalism

Like purposivists, intentionalists permit, even encourage judges and decisionmakers to go beyond the four corners of a document and to look at the statute's underlying purpose in interpreting it. Generally, intentionalists believe that it is only necessary to go beyond the four corners of a document if the statute's plain meaning is unclear. Intentionalists look primarily to legislative history as probative evidence of congressional purpose.

Blatant subscription to legislative intent is not without its difficulties. Legislative history may not always be reliable; staff can hide the true intent behind a bill with the use of clever language. Statements in legislative history could be more of a tool to provide political cover rather than a blueprint on what the original enacting coalition intended the statute to mean. Indeed, as Brudney (2003) notes, it may be especially difficult to adhere to an intentioanlist

approach in interpreting the NLRA. Any intentionalist reviewing the NLRA must largely look to the legislative guidance of the 1935 and 1947 Congresses who passed the Act. Modern post-industrial labor problems may be very different from the types of problems labor faced in that period. Quite simply, it may be very hard to use legislative intent when legislative intent simply is not there.

Other Canons

Issues of statutory construction do not merely reflect the debate between textualism. purposivism and intentionalism. Rather, any empirical examination of statutory construction would not be complete without considering how the Board uses substantive and textualism canons of statutory construction. In the statutory construction literature, scholars separate out statutory construction depending upon whether it represents a "substantive" standard or a textualist one. Substantive canons instruct the reviewing body to favor interpretations of a statute that favor certain values or policies. For instance, the so-called "Indian" canon states that national statutes be construed as favoring Native Americans. The "Rule of Lenity" espouses that any ambiguity be resolved in favor of the defendant. The oddly named "Charming Betsy" doctrine states that national statutes be construed so as to not conflict with international law. Other statutory canons opine that statutes be interpreted so as to not violate so-called "fundamental values," or so as to not abrogate sovereign immunity.

Textualist canons, on the other hand, set forth "rules of thumb" understanding in how to interpret the actual text. The most common textualist canon is the "plain meaning rule" whereas the reviewing body will interpret the words according to their everyday meaning. Other textualism canons concern a rule against redundancy as well as a rule that the general does not distract from the specific. There are also a host of Latin-named textualism canons: *ejusdem*

generis, which states that when there is a list of two or more specific descriptors followed by general descriptors, the general descriptors must be restricted to the same class; *expressio unius est exclusio*, which states that items not on a list are impliedy assumed to be excluded; *in pari materi*, which states that when a statute is ambiguous, other statutes may illuminate its meaning; and *noscitur a sociis*, which states that when a word is ambiguous, one should discern its meaning by looking at references in the rest of the statute.

Statutory Canons Applied to the NLRB

What can we say empirically about how the NLRB interprets statutes? Which view predominates at the Board? To begin to address this issue, I look at NLRB cases through the Bush and Clinton years, looking specifically only at the cases dealing with unfair labor practice disputes decided on the merits. All told, compiling a Lexis search of cases in which the Board expressly engages in statutory interpretation yielded a total of 499 cases. For my first crack at the data, I looked at all Board cases for the years 1993-2007 – both unfair labor practice disputes as well as the more frequent representation cases; I also included all Board actions, including default orders and summary judgment motions. Specifically, I searched for any reference to legislative history, plain meaning, textualism or statutory construction or statutory interpretation; I also searched for substantive and textual canons by their name (including the Latin name) as well as through words like redundancy and exclusion when referring to statutory text.

The results are both over and underinclusive. They are overinclusive in the sense that since I limited the study to only unfair labor practice disputes after the initial case gathering, I was left with only 141 cases to look at out of the 499 cases total. As such, it appears the Board is doing a great deal of statutory interpretation but it is not necessarily doing statutory interpretation on the issue – unfair labor disputes - discussed in this dissertation. This result is also likely

grossly underinclusive as well, because the Board, in essence, engages in statutory interpretation every time it rules on an unfair labor practice disputes. However, because the NLRA has not been amended since 1959, there really have been no changes to the underlying statutory language that is at the heart of NLRB disputes. As such, most statutory interpretation at the NLRB goes on in a more hidden fashion, whereby the Board cites existing Board precedent or Supreme Court cases detailing how a statutory term should be construed. As such, when analyzing statutory construction at the NLRB, most often the Board simply refers to its past precedents rather than considering *de novo* how to interpret the statute. As such, it would be difficult to pick up such "hidden" statutory interpretation. Moreover, most cases that the NLRB hears on unfair labor practice disputes rest on issues of credibility rather than statutory interpretation. For instance, an employee is fired for union activities and brings a complaint against the employer. Board precedent has long established what sorts of conduct comes within the ambit of the NLRA so most cases rest on evaluation of the facts and assessing whether the facts, as a whole, constitute enough evidence to justify imposition of liability. Nonetheless, despite the fact that the NLRB rarely engages in direct statutory construction, especially of section 8(a) of the NLRA, it is still important to assess how the NLRB does in fact interpret the wording of statutes in the few cases where it decides statutory issues of first impression. What then can we say about the ways in which the NLRB interprets statutes – in the limited study we did hear of the pool of unfair labor practice disputes 1993-2007?

The full five member Board hears a disproportionate portion of statutory interpretation cases.

Not surprisingly, despite the fact that the full Board of five members only hears a handful of cases a year, a disproportionate amount of those five Board cases concern statutory interpretation. The full Board hears about five cases a year, yet just under 50% of those cases

concern statutory interpretation. As noted, the NLRB hears two types of cases: unfair labor practice disputes under section 8(a) and section 8(b) as well as cases dealing with elections. A disproportionate amount of the NLRB's statutory construction hails from the representation cases, perhaps because such cases may be more likely to raise novel fact scenarios that require application to how the statute reads on facts.

Indeed, some of the most headlining making cases of the NLRB concern statutory interpretation cases done by the five member Board, though usually the headline-making cases concern representation issues rather than unfair labor practice disputes. Many of these cases, for instance, concern the interpretation of a certain word in statute. For instance, in *Oakwood*, the Board was charged to interpret the word "employee" as used in Section 2(3) of the Act. The issue in the case concerned whether the section intended to exclude supervisors from the ambit of the Act's definition of "employee." To address the issue, the Board looked at the statute's plain meaning; they also looked at legislative history. The Board expressly states that it eschewed a "results driven" approach because it said it had to start and end with the words of the statute. As such, the Board declined the suggestion of the dissent to engage in a more purposeful interpretation of the statute, placing more emphasis on real-world consequences. Moreover, not surprisingly, the Republican-appointed judges dominated the *Oakwood* panel; as a whole, Republicans generally favor a more textualist approach. Indeed, nearly a third of the statutory construction cases that the NLRB deals in our limited dataset with concern how to interpret the word "employee," with the Board using the *Oakwood* decision as the "template" for how to interpret whether or not someone is an "employee." This applied even if the case concerned an unfair labor dispute issue as opposed to a representation issue.

Five member Boards dominated by Republicans often adopt textualist methodologies which in turn influence how three member Boards will later rule.

The statutory interpretation in *Oakwood* also makes apparent the fact that choice of statutory methodology is necessarily a partisan issue on the Board. It is of loss to no one the fact that the *Oakwood* Board concerned a primary Republican majority, with three members being Republican and two members being Democratic. This trend – that statutory interpretation is necessarily driven by partisanship – persists in other cases as well. Indeed, in about half of the cases where the Board was dominated by a Republican majority, the Board adopted a more textualist approach to statutory interpretation. Thus, as we saw in Chapter 4 with respect to case outcomes, it appears that statutory methodology and how one chooses to construe statutes is by its very nature a political process. While this result has long been suspected, few have actually documented this trend with empirical evidence. In other words, the panel effects we observe partly occur because of statutory methodology. The same size here is small, however, so the results should be taken with caution.

Moreover, because of the way that the Board is structured – with the five member Board making precedential decisions – the full Board has a virtual monopoly on how the Board interprets statutes for purposes of precedent so it is misleading to look at raw numbers above to discern how the Board interprets statutes. That so much of the Board's statutory interpretation occurs in the five member Board has very real policymaking implications for the Board, as anytime a Republican president can get power over the full Board, he or she can change the way that the Board interprets statute. Pure textualism, or at least reliance on cases decided solely by the words of the statute itself, motivated decisionmaking in less than a quarter of cases. Oftentimes the "lead" case may have used a textualist approach and Board panels dealing with the statute again follow the lead of the 5-member Board. For example, the two most frequent

statutory interpretations for NLRB unfair labor practice disputes in the database concerned either the word "employee" or the word "labor organization." For the word "employee," *Oakwood* serves as precedent for the Boards interpreting the term, so even though these later Boards do not expressly adopt a textualist approach, they in turn advance a textualist understanding of the term by continuing to cite to *Oakwood* to interpret the meaning of the term "employee." Board precedent sets forth clear tests on what it means to be an "employee" or to be a "labor organization" so once those issues are settled precedent, the Board does not often revisit the issue, especially if the Board sits in three-member panels.

Purposivists and intentionalist dominate statutory decisionmaking in the vast majority of cases heard by three member Boards in litigated unfair labor cases decided on the merits.

This is not to say, however, that purposivism or intentionalism are absent at the Board; to the contrary, they are very much alive and could be said to be the dominant methodological construct at the Board. Indeed, throughout the period under question, most panels applied a more purposivist or intentionalist methodology, even if dominated by Republicans. Republican Board were more apt to apply a more textualist approach in five member Board decisions, which is not all together surprising given that the only way for the Board to "officially" make precedent is by hearing a case through the full Board. Thus, the impact of partisanship is all the more intensified because majority Republican Boards have a more effective tool for making their influence last longer through interpreting a statute narrowly using a textualist approach. Indeed, one of the reasons why the Board is accused so much of flip-flopping may be due to the fact that the Board can "flip" its interpretation of statutes so readily as the Board does not always apply *stare decisis* to its own decisions, particularly if they emanate from only a three member panel.

Comparing intentionalist v. purposivism, the Board seems to tend to look more to how the original Congress enacting the statute would have decided the cases. Indeed, of the cases

applying a purposivism or intentionalist approach, more than half of them could fairly be said to be more intentionalist in nature. Again, this result too is not surprising. Congress has not said much on the nature of labor law in the more than half century since it passed Taft-Hartley. After the turmoil of the 1930s and 1940s, labor disputes have not been on the front pages of newspapers. Labor unions are in decline and few Americans seem to really care today about the state of labor unions. Indeed, in surveys, concern about organized labor falls to the wayside with most Americans being more concerned about terrorism or the economy. Further, given the legislative history of Taft-Hartley – and the clear elucidation of the Act's purposes and aims through the legislative history – it is of no surprise that legislative history is often cited to. Indeed, of the almost 500 cases, about 179 cite in some form to legislative history, with the most common course of legislative history being committee reports.

It is important to note, however, that it may not be necessarily the case that an intentionalist approach trumps a purposivism one. Rather, it may only be the case that it is easier to interpret the intentionalist methodology given the way that the Board decisions are written. Moreover, oftentimes both methodologies are apparent; indeed in about half of the cases applying legislative history, it is clear that the Board appears to adopt both approaches. In most of those cases, it cites to the legislative history to set forth the purpose of the statute. Legislative history, of course, is not always clear.

Of the textual canons, the Board often looks to other parts of the statute or other statutes generally to inform decisionmaking on interpretation. Moreover, it very rarely specifically evokes use of a particular substantive or textual canon.

It also became obvious that the Board relies on certain substantive and textual canons more than others. In particular, the Board looks to ensure consistency within the greater statutory framework of labor law, so in many cases, it interprets a given statutory section by

looking at the interpretation of another section in the NLRA. The Board is also cognizant of other statutory schemes and in a few cases, it expressly noted that it was important to interpret the NLRA considering the purpose and text of other statutes. For instance, there was one case involving Title VII, and the Board sought to reconcile the two statutes, even though the statutes were passed at different times by different enacting coalitions. Overall, looking at our results, we see these particular substantive and textualist canons far less implied, at least expressly. For each of these canons there was at most one or two cases where the Board expressly employed the rule, so it is impossible to discern any particular pattern to their use. Indeed, the fact that so few substantive and texualist canons are employed explicitly by the Board is probably the most significant thing to glean from this study. It underscores the fact that while textualism remains a meaningful method to interpret statutes – particularly by Republicans sitting in the 5-member Board – it is still the case that looking at a more purposivism approach remains the dominant method of statutory interpretation at the Board.

Limitations

The short summary undertaken here is just the beginning of exploring statutory interpretation at the NLRB. The dataset created as part of this dissertation, unfortunately, does not capture many cases in which the Board actually engages in statutory interpretation, probably because 1) most instances of statutory interpretation occur by the full Board so while I had gathered the data for the 49 cases in total heard by the five member Board, I did not include full Board decisions in the analysis for Chapters 3-5 so the analysis I did here of five member Board decisions is somewhat limited; 2) many statutory issues concerning unfair labor practice disputes are settled precedent at the Board so the Board indirectly interprets statutes by relying on caselaw by the Board or Supreme Court; and 3) most unfair labor practice cases simply do not

require the Board to even venture into the territory of statutory interpretation as they rest on issues of credibility or the application of facts to law. The latter point is hardly surprising given that the NLRA has not been amended in over 50 years, and the statutory sections underpinning unfair labor practice disputes is very short, so there are not many statutory terms to even interpret. In observing the cases where the Board did actually interpret statutes, it seem that a disproportionate share of those cases concerned representation cases as well as cases brought under other procedural motions. As noted in the beginning of this chapter, I eliminated most cases through my Lexus search because they were not unfair labor disputes or constituted decisions that were not on the merits. For instance, the Board hears and decides many motions for summary judgment every year and it seems like that the Board more readily engages in statutory interpretation in those cases. This, of course, makes sense. A party asking for summary judgment contends that there is no genuine issue of material fact; as such, any such motion largely rests on legal arguments, such as how a given statutory term should be applied or what it should mean. As such, to really gain a full appreciation of how the Board actually interprets statutes, one would need to broaden the cases reviewed beyond unfair labor practice disputes and beyond simply the cases I had in my database. Moreover, in order to truly understand how an agency decides statutory meaning, one needs to venture beyond just reading cases. For instance an agency like the NLRB makes statutory determinations all the time yet it make never make such decisions public. Thus, one would need to look at things like the General Counsel's decisions concerning his or her election not to proceed to file an unfair labor practice dispute case. In such decisions one may be able to glean more about statutory interpretation by agencies than by looking merely at NLRB adjudications.

Another limitation is the method of deciding what statutory methodology the Board actually uses. Since there has been so little empirical work on statutory interpretation, there is no set method in devising how to allocate a decision to one methodology over another. It may especially be the case that it is easier for a coder to pick up the explicit use of an intentionalist methodology since clear references to legislative history like references to committee reports, etc. signals a more intentionalist approach. Vague references to purpose in informing statutory text may be harder to pick up. Moreover, oftentimes, the judges may adopt a method but then the court opinion will offer no insight into that method. As such, any empirical study of statutory interpretation should consider these caveats.

How Should the NLRB interpret statutes?

Given the prevalence of purposivism at the Board and the tendency of Republican dominated Boards to prevail in interpreting statute's textually, what can we say about how statutory interpretation should ideally be done at the Board? The answer may come down to what one views as the role of a given administrative agency. Should it be a faithful delegate of the political principals or should it be the "guardian" of the interpretation of the relevant overarching statute? For the case of the NLRB, the NLRA is essentially the only statute that the Board has to interpret. To engage in an intentionalist interpretation of the NLRA would seem to subvert the role of the NLRA to merely be an interpretor of what the Congress of 1947 had in mind regarding labor law. Such a view would seem to be at odds with the general set up of the NLRB. For instance presidents have the prerogative to change NLRB chairs and to appoint members. If adherence to legislative history were seen as the sole duty of the NLRB that would seem at odds with the NLRB scheme put in place. In other words, what would be the purpose of letting politics play some role in NLRB decisionmaking if NLRB members were slaves to the

original understanding of the NLRA? Why not just have a federal court do it? The Taft-Hartley Act is, at its heart, anti-union in some respects and the long history preceding Taft-Hartley underscores how it was actually fear of the labor movement that motivated Congress to change the Board's structure and to change the statutory scheme. As such, in this particular statutory scheme, advocates of labor may find it very troubling to rely on legislative history as a means to informing the NLBR about adjudicating labor practice disputes.

Moreover, a textualist reading of the NLRA seems at odds with the NLRB's structure and purpose. If the text itself were the primary criteria for interpreting the NLRB, what indeed would be the purpose of having a specialized body? Why not just have the cases heard in the regular district courts? If the political system is not going to take advantage of the specialized expertise of the NLRB, it would seem superfluous for the NLRB to interpret statutes in ways that are inconsistent with its very being. Textualism may especially be an approach that is inimical to interpretation of labor statutes in particular given how the labor movement has advanced so much in the last eighty years. Adherence to a text constructed by congressional leaders who intended to curb a labor-friendly Board does not seem relevant in today's world. Moreover, a textualist approach seems at odds with the Board's frequent flip flops on important issues of policy. If the few words of the NLRA actually have a clear and unambiguous meaning, once the five member Board interprets a term, it would be unnecessary for the Board to engage in statutory interpretation of that term again. The issue would be settled, and there would be no flips flops. A longer longitudinal study of statutory meaning would allow one to discern how differing Boards flip flop specifically on statutory interpretation. If in fact they do engage in frequent overturns of statutory meaning, with the five member Board frequently overturning the

interpretations of other five member Boards, it would seem inconsistent to rely on a texutalist approach. In other words, frequent flip flops seem only compatible with a purposive approach.

As such, using a statutory construction method focused on purposivism seems to be the only method of statutory interpretation consistent with the purposes, aims and history of the NLRB. Formed during the New Deal, the NLRB was charged to be an expert body to fashion labor policy. Its founders deliberately isolated the NLRB from the reach of the federal courts due to the long-standing tension between labor and the courts regarding labor policy. Agencies like the NLRB charged with expertise should use that expertise to update the statute to reflect current realities. Agencies should in essence be policymaking entities and they can use those powers in interpreting statutes. Moreover, with changing times and shifting economic winds, the Board, advancing a purposive approach, would be best able to effectuate the purposes and aims of an expert labor body. The short study undertaken here of unfair labor practice disputes decided on the merits indicates that the Board overall does look to the overall purpose of the statute in effectuating meaning. Moreover, the few substantive and textual canons the Board uses in its decisions reflect the fact that the Board works hard to reconcile the different parts of the NLRA as well as the text of other statutes related to the NLRA.

Although the data just briefly touched on the topic, it is also important to view the NLRB as part of an overarching chain, with the ALJ and the reviewing appellate courts also taking a role in interpreting statutes. No analysis of statutory construction would be complete without looking at how both parties review statutes and how they anticipate and react to Board decisions. My study of appellate court decisions in Chapter 5 indicates that about a third of the decisions reviewed by the appellate court concern statutory meaning. But who is it that we want to interpret the statutes? Under *Chevron*, courts should defer to the agencies, but as a practical

matter that does not always happen. A greater understanding of how statutes are interpreted through the various stages of a case would lend much to the debate concerning deference and democratic accountability.

Chapter 7: Conclusion: Proposals for Reform

The subject matter of this dissertation provides a glimpse on how one specific administrative agency – the NLRB – acted during the Clinton and Bush presidencies. What can we then take from the empirical knowledge gleaned to both inform our understanding of the NLRB as well as administrative adjudication altogether? At stake in any discussion of administrative adjudication is how to balance values: how should any administrative system be structured so as to be both independent yet democratically accountable? We can only know how to answer that question if we set clear guidelines on what we expect of independent agencies and gather empirical information to measure whether the agency actually subscribes to what we expect of it. If not, we need to either adjust our expectations of the balance or structure the agency differently so as to better serve the values we want it to have.

It is to these questions that we now turn to in the Conclusion. Specifically, I focus on three aspects of decisionmaking: First, what can we say about the role that politics has played in impacting decisionmaking? Is this how the NLRB – or any adjudicatory agency – should operate? Does the role of politics play a different role at the NLRB than at the federal courts? Should it? Second, what can we say about the role the federal courts play in interpreting agency decisions? Questions in the legal literature focus heavily on the role that deference plays in helping federal courts decide agency decisions. Does the empirical examination illuminate any features of agency decisionmaking that the upper federal courts may need to tend to? Third, what can we say about the way agencies actually interpret statutes on a day to day basis? Although our dataset was limited to litigated unfair labor practice cases, it offers a fruitful beginning on how agencies actually interpret statutes in their decisionmaking.

Political Decisionmaking

Does the NLBR function the way an independent agency should? Congress designs independent agencies to fill different roles, and in particular the NLRB's founders designed it to act in many ways like a "labor court." Does the NLRB of today fulfill its mission of being a dispassioned court? The fact that decisionmaking at the NLRB may be at least partly motivated by non-legal factors raises some concerns (Turner 2006). The impetus behind the Wagner Act and the formation of the NLRB was to "substitute the rule of law for industrial strife" (Gould 1998) Charged to be an "expert," NLRB's overturning of its past decisions may also cast doubt on the agency's purported expertise (Turner 2006). Indeed, the NLRB's frequent willingness to change precedent or to base its decisions outside of agency expertise calls into question whether the statutory interpretation by the agency is a reasoned one that should be entitled to deference by higher level courts. Frequent flip flops raises the question of whether the agency is acting in an arbitrary and capricious manner. Indeed, scholars have questioned the expertise of the agency, with one noting that the "veil of fictional expertise …obscures the continuing costs of possibly unsound decisions" (Edley 1990, 51-52).

Ideological voting on the Board also raises the issues of whether the NLRB should be considered a quasi-legislative institution as opposed to a quasi-judicial one, as the NLRB's founders envisioned. The fact that Boards operating under different presidential administrations may craft new legal rules may contribute to the belief that the Board acts like politicians carrying out their electoral mandate to favor labor or to favor management. This, of course, is how we might expect a legislature to act. As such, if one viewed the Board as a quasi-legislative entity, we would not be as troubled that it was not as bound by the rule of law. Just like a legislator, a quasi-legislative entity would be "interested in the views and desires of her constituents and, if

she agrees with those positions, may attempt to enshrine them in a legislative command (Turner 2006).

On the other hand, others may not be as troubled by the partisan effects found here for two reasons. First, it may be the case that this is precisely how administrative agencies should operate in a checks and balances system. Some contend that because the language of the NLRB's governing statute is broad, so long as the NLRB stays within the confines of its mission, it is not problematic. As Board member Battista (2005, 14) stated, the majority of the Board "serv[es] relatively short and staggered terms" that will necessarily "reflect, to some degree, the governing philosophy of the appointing President. Purists may gnash their teeth at this, but it was part of the congressional design." Still others may contend that ideological voting at the Board serves as a democratic safeguard to ensure that so-called "independent" boards do not stray too far from the mission of the president who appoints them.

As such, if we view the Board as primarily an expert policymaking body, then we should expect that Board members – appointed by the President – to in some sense reflect the ideological philosophy of the President who appointed them. There is always a tension between expertness and democratic accountability and the linkage here of having the Board members being appointed by the President fulfills the aim of making the Board democratically accountable and in ensuring that the Board does not simply go and make its decisions completely divorced from the wishes of the populace. At the same time, however, while it is important to have that democratic link, there are some changes that can be made at the Board to ensure that the Board does not shift too strongly in the direction of making judgments too distanced from what political actors other than the President may want. Specifically, as I discuss below, three changes could perhaps be considered to make the Board function better: first, the Board's rules could be

reformed to mandate panel diversity or to at least foreclose DDD or RRR panels from hearing cases. Second, the Board could turn more to rulemaking to set forth standards that could guide case outcomes. Finally, the appointment process could be changed to ensure that less partisan members are appointed to the Board. These three changes would do much to ensure that the Board does not swing too much to the side of making its decisions too political.

Mandating Panel Diversity

The Board would be a less political body – or at least be perceived as being less political – if the Board mandated politically diverse panels. Many scholars argue that diverse bodies simply make better decisions (Shapiro & Murphy 2012). Gennaioli and Shleifer (2007) and Ponzetto and Fernandez (2007) contend that when judges distinguish cases, political bias, on average, balances out over time. Judge Harry Edwards (2003) of the District of Columbia Circuit contends that diversity fosters collegiality which in turn leads to the exchange of more correct information. While the NLRB does not have explicit partisan balancing requirements, the results here indicate that perhaps justice is not been served because case outcomes appear to be motivated, at least in part, by the random chance of the partisan composition of the panel. There can also often be a tension between collegiality and dissent. On the one hand, the number of dissents would rise if the background of judges varied too much and norms of collegiality could be threatened. Yet, on the other hand, the actual court decision "is more likely to be right… if it is supported by judges of different predilections" (Sunstein et al. 2006, 136). The five member Board may also be less likely to overrule past decisions and flip flop if decisions were made by mixed panels. Another solution may be to simply increase the size of the Board to seven members, with the Board sitting in panels of five. Such a change would in essence

mandate panel diversity and would be "less antagonistic" to judicial tradition than a statutory requirement of mixed panels (Shapiro & Murphy 2012, 361).

More Rulemaking on Major Issues that are Litigated Frequently

The NLRB could also engage in more rulemaking to make decisions less ad hoc. Unlike many other administrative agencies, the NLRB rarely engages in rulemaking. Indeed, throughout its existence, the NLRB only has done one rule, instead preferring to do the vast majority of its work through individual adjudications. Perhaps the time is ripe for that to change and to at least consider codifying certain rules to guide decisionmaking in cases (Grivati 2014; Acosta 2010). For instance, instead of relying on Board adjudications to define the term "employee," the Board instead could engage in notice and comment rulemaking to set forth clear standards on who is or who is not entitled to protection under the Act. One of the problems with the NLRB is that it is in essence a policymaking body, yet adjudications come too fast and at too great a volume with so many different decisonmakers ruling on cases making it impossible to foster consistent policy. Although rulemaking certainly has disadvantages,[151] using it to impose more clear standards could do much to make the Board more an expert policymaking body. Board member Acosta (201) advanced rulemaking as a solution to make the Board more efficient and consistent. Rules would also give greater guidance to the General Counsel on whether or not to issue complaints, leading to perhaps more settlements of cases as Board decisions would be seen as being more predictable. In all, some system of limited rulemaking to guide adjudicatory decisions would do much to impose greater consistency in the system and would mediate the effect that panel type could have on outcome as Board members would have to affirmatively consider the rule when making decisions, leading to less ad hoc decisions (Tuck 2009). This

[151] For instance, rulemaking is not retroactive and its slow pace could be impractical in some circumstances (Rachlinski 2005). An agency may also not know how a given rule should be applied.

change need not be limited to merely notice and comment rulemaking; it could also come in the form of guidance documents from the General Counsel's office, interpretive rules or general statements of policy so as to better combine the benefits of rulemaking with the benefits of adjudication.

Change in Appointment Process

The political nature of NLRB decisionmaking also raises the specter of whether there should be changes in the appointment process. Prior to the 1980s, Board appointees were generally moderate in their decisionmaking (Flynn 20000). Indeed, nominations to early Board hailed mostly from government service or academia. The appointment process changed in the Reagan years to be much more ideological, with the Senate asserting a more direct role in appointing nominees to federal agencies by exercising less deference to presidential picks. Changes in the appointment process over the last decade – including the rise of so-called "package nominations" where groups of nominees for different governmental posts are "packaged" together for a Senate vote – exacerbated the trend of the nomination process in general becoming much more partisan than it had in the past.[152] More extreme nominees – on both sides of the political spectrum, depending on whom the president was – could thus be placed on the Board, resulting in a sea-change in the ideological nature of Board decisionmaking. This change, of course, was not limited to the NLRB; appointments to other agencies such as the EEOC and FCC followed a similar pattern. The NLRB at the turn of the 20th century – consisting of two ex-management lawyers, two former union lawyers, a former law professor

[152] Indeed, with one exception, excluding recess appointments, all of President Clinton's nominees to the NLRB were package appointments.

and a career Board employee - was exactly the type of Board that Congress expressly rejected when designing the NLRB.[153]

The appointment process should be altered to put the President back in the driver's seat. Presidents generally have a greater incentive to choose more moderate nominees to an agency whereas Senators, particularly Republican Senators with ties to industry, may need to curry favor with supporters intent on diminishing the role of organized labor. The internal rules of the Senate such as the increasing practice of allowing individual Senators to issue holds on nominations to delay consideration of a particular matter plus the fact that the Senate committee system ensures that few Senators actually have a stake in the outcome of NLRB decisions gives even more power to the Senate as an institution – and to individual Senators on appointment committees – to control the appointments process and in turn to control who gets appointed to the NLRB. This is not really how a so-called "independent" is meant to function as the mechanism of "control" changes from the President having much say to a single group of Senators on the appointments committee essentially controlling the process. Indeed, an adjudicative body handpicked by a select group of Senators could hardly be the type of Board that was envisioned during the New Deal. This issue, of course, is not unique to the NLBR. The increased polarization of the appointment process characterizes many administrative agencies. But the process can be changed to ensure that the President has more of a say than he does currently. Perhaps, for instance, the NLRA could be amended to expressly require a certain type of person be appointed to the Board, that is, perhaps the NLRB should return to what it was

[153] When designing the NLBR, Congress expressly declined to adopt Senator Wagner's original bill that would have set up the Board members as having two members "designated as representatives of employers, two as representatives of employees, and [one] as representative[] of the general public" (Flynn 2000, 1452).

before WWII and have most of its members hail from public service or academia rather than from either management or labor.

In all, the debate continues on what it means to be "independent," and we need more empirical analysis of administrative agencies in order to assess whether the way they operate coincides with our interpretation of what it means to be "independent." Do we want ideological appointments on independent boards to vote in line with their partisan preferences? An adjudicatory body can still be "independent," yet still be partisan. Or do we want such commissions to decide cases free from the reins of partisanship? Are we troubled by the fact that the random choice of a Democrat or a Republican on a panel could influence how the panel will rule? Given the ideological nature of the appointment process, it is unlikely that the Board will return to its original mission of serving as an unbiased expert. Yet, maybe that is sufficient. Maybe the presidential appointment process provides the sufficient measure of checks and balances to protect against excesses by any one branch of government.

Relations Between the NLRB and Upper Federal Appellate Courts

We also need to fundamentally rethink the relationship between the NLRB and the federal courts. As noted in Chapter 2, New Dealers were very suspicious of federal courts as it related to labor matters. For all intents and purposes, they wanted federal courts to stay as far away from the NLRB as possible. This overriding philosophy pervades the NLRB today and is in tension with the spirit of judicial review. What then do we see as the role of the federal courts in reviewing NLRB decisions? On the one hand, if indeed, the NLRB decides cases in an ad hoc fashion, we need a robust judicial review to rectify problems. On the other hand, however, if many of the issues that the NLRB decides pertain primarily to policymaking matters, courts should defer to the agency. As I detail below, the federal courts seem to have upset this delicate

balance by overruling the NLRB in instances where they should defer. To rectify the imbalance, the NLRB needs to make more clear that it is making policy judgments entitled to deference. Moreover, it is time now to debate whether a specialized judicial appellate court – similar to the Federal Circuit in patent cases –should review the decisions of the NLRB.

Make Policy Choices Explicit

Scholars have noted that the NLRB has expressly downplayed the role it plays as a policymaker – a strategy which in turn has caused problems between the NLRB and the federal courts (Hayes 202). The Board routinely employs two tactics in its relations with the upper federal courts: 1) abiding by a policy of non-acquiescence, meaning that the NLBR essentially does not hold as precedent rulings of upper appellate courts; and 2) disguising its policymaking as "fact-finding" so as to ensure that its decisions rarely get overturned under the *Chevron* standard of review applied by the upper federal courts. Both "policies," however, have upset the carefully created balance between the Board and the federal courts. In 1998, the United States Supreme Court in *Allentown Mack Sales and Service, Inc. v. NLRB*[154] set the path open for appellate courts to disregard NLRB fact-finding. Because the NLRB had for so long failed to make clear what is fact and what is not – and therefore what was entitled to deference and what was not entitled to deference- appellate courts often disregarded Board precedent and decided cases however they wished. In *Allentown*, the Supreme Court made clear that absent clear indications from the Board that its decision represented a policy judgement, reviewing appellate courts could consider Board rulings under the "substantial evidence" standard. The Board's long-standing practice of "hiding the ball" to safeguard its judgments from the purview of the appellate courts resulted in this shift in power. After *Allentown*, appellate courts are more likely

[154] *See Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998).

to look more carefully at the record and potentially reverse "nonpolicymaking" decisions because they deem them to be potentially mechanisms of the Board to hide its decisions from judicial purview.

Although I did not do a record check, in many of the cases in the dataset here, the courts reversed NLRB decisions in their entirety due to lack of substantial evidence. In most of those cases, the court went into detail discussing the facts of the case. If the Board were truly seen as a policymaking body, the courts would not do this. Indeed, they should not do this. If the Board made more clear that many of its factual judgments are in fact policymaking considerations, it would be more clear that the court should simply defer. Moreover, because of the NLRB's widespread – and explicit – policy of not abiding by any appellate court decision as precedent, many appellate courts simply overturn the Board decision rather than remanding it back to the Board. Such a practice violates the principle of judicial review and usurps the power of the agency to make policy. This is not entirely the court's fault. The Board should not simply think that it is immune from judicial review. Rather, the Board should make explicit that it will abide by federal court decisions in certain instances, such as when the federal courts interpret a statute. If the relationship between the federal courts and the NLBR were better, each would be able to give each body the respect it deserves.

Specialized Appellate Court?

The data explored in this dissertation indicate that appellate courts are more likely to reverse decisions of the Board than the Board is of the ALJ and that panel effects pervade decisionmaking in the court of appeals on NLBR cases. This calls into question whether we are indeed using independent agencies the way we should. Independent agencies are charged to have expertise in a given field. Frequent overturning of cases by appellate courts leads one to

ponder whether this expertise is actually being used effectively. Perhaps it is necessary now to have a specialized labor appellate court, similar to that which exists for patent law with the United States Court of Appeals for the Federal Circuit. Having a specialized appellate court whose judges would hear labor cases would do much to streamline the process in how cases are decided. Expertise – rather than political judgment – could perhaps be the guiding principle of decisionmaking. Moreover, the fact that so-called partisan panel effects exist on the federal court of appeals as noted in Chapter 5 underscores the necessity for perhaps a smaller, specialized body to oversee Board decisionmaking on the higher level. Of course, partisan panel effects might not disappear completely – we see panel effects for instance on the Board itself- but norms of collegiality and desire to consensus might operate more faithfully among judges who sit together regularly and who can observe how other judges think on a given legal matter. As it stands currently, each individual federal appellate court hears only a few labor cases a year, so it is impossible for judges to really know the ins and outs of the legal issues underlying the decision. Indeed, when a circuit court fails to hear a "critical mass" of cases on a given subject matter, it may not perform optimally (Meador 1989).[155] A specialized labor court could perhaps do much to bring back expertise to NLRB adjudications. Judges on such a court would be more familiar with Board policy and might be better able to separate out the policymaking/nonpolicymaking divide that constitutes the standard as to whether Board decisionmaking should be deferred to or not. Moreover, in addition to having a specialized review body, it is also important for appellate courts to defer more to the expertise of the Board. Having expertise in the intricacies of the NLRA, Board members can better apply the statute consistently to given factional scenarios. Moreover, the Board has an army of permanent career

[155] About 1% of circuit court cases concern the NLRB.

staff and ALJs hearing cases whereas appellate courts rely on generalist judges assisted by law clerks newly out of law school with little expertise in NLRA law. A legal standard where the appellate court defers more to the fact-finding of the agency would do much to ensure that the NLRB's expertise is used to its full advantage.

Statutory Construction and the NLRB

Understanding how agencies construe statutes cannot be done in a vacuum; rather, statutory construction can be thought of as one way in which Board members can act on political goals while at the same time hiding behind a veil of legalese. One of the reasons why people may find so-called partisan panel effects to be troubling is because they could have far-reaching implications. Nowhere do we see this more than in the issue of statutory interpretation. Even though it may occur on only a few panels, the fact that Republican Board members could be more likely to favor a narrower textualist methodology means that they potentially can exercise more influence on legal doctrine stretching beyond a single case. What can the NLRB do to address this issue? Should we be worried that the same statute could be interpreted differently depending upon who sits on the panel? The answer to that question would perhaps be less concerting if Board members adopted a more purposivism interpretation of the Act. If the NLRA is indeed meant to be understand under changing times and circumstances, then a statutory canon of interpretation that takes those considerations into account seems reasonable. It would also be in accord with seeing the NLRB as a policymaking body. However, changing precedent often using a mix of texualist and purposive methodologies seems troubling. If the plain meaning is clear, why would the interpretation of the statute have to change? Although the present study covered only 16 years, it would be interesting to see if over time Democratic

majority boards apply more of a purposive approach while GOP Boards apply a textualist approach, switching interpretations of the statute with changing presidential administrations.

Moreover, the Board can also do much to ensure that there is no so much flip flopping on statutory meaning. Although often talked about, the Board can resolve much of its frequent flip flopping by switching at least some of its main decisions to being made by the rulemaking process. It may especially be the case that using rulemaking to set forth interpretations of statutes would best serve the labor community by setting forth clear standards on how the law should be applied. Setting forth clearer standards could potentially limit the number of adjudications as parties would be more likely to settle if the legal standard is clear. Moreover, having clear rules would do much to ensure consistency in an otherwise arbitrary process.

Conclusion

Almost 80 years since its founding, the NLRB is in some ways a very different agency that the one created doing the New Deal. As Board member Acosta (2010) argued, the Board today is operating with institutions formed before World War II. All too frequently the Board is seen as a political vehicle for party in power to use to force a certain agenda for or against labor. The Board today functions very much like a court, which is all the more ironic given the fact that the Board was formed specifically to ensure that labor disputes not be routinely handled exclusively in the courts. The NLRB should return to its roots and be respected for the expertise –both labor and legal-based – that it has.

The focus on the NLRB provides an excellent case study for exploring these issues with respect to the administrative state more generally. Independent agencies are prized for their expertise yet like the NLRB, all too often independence simply means that the dominating political power controls the fortunes of the agencies. Expertise fails to the wayside and serves as

the smokescreen for political influence. Many of the issues discussed in this dissertation concerning the effect that partisanship has on multimember panels as well as how agencies empirically decide cases should also be addressed by other agencies as well. While there is a rich literature in administrative law on rulemaking, much more needs to be done to understanding how agencies actually adjudicate cases. Because of the unique internal adjudicatory structures of administrative agencies, it is difficult to apply universal lessons. The NLRB is alone in the sense that it is one of the only agencies with a split enforcement structure. Nonetheless, the lessons learned from studying the NLRB can serve as a framework for understanding how agencies function in the greater political system. We should understand how agencies make decisions, how they relate to the upper level courts and how they interpret statutes. This dissertation is simply a first crack at looking at those issues for a specific agency over a limited range of years.

From this analysis, we see that partisanship characterizes the process more than it should. While the system is designed in some sense to be a partisan process, there comes a point where expertise equates to partisanship. Agencies like the NLRB should not hide their decisionmaking behind the veil of expertise. Partisanship can and does have influence in determining how independent agencies will rule, but there comes a point where expertise falls to the wayside. As noted in this chapter, however, the NLRB should adopt additional institutional features to lessen the influence of partisanship in the process. Changes like mandating panel diversity or engaging in more consistent rulemaking would better allow the Board to leverage its expertise. This change, moreover, would influence how appellate courts react to Board decisions, because instead of frequently overturning Board decisions, courts would be more likely to defer to the expertise of the agency.

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Appendix A, NLRB Composition, 1993-2008

The Smith Seat	**The Madden Seat**	**The Carmody Seat**	**The Murdock Seat**	**The Gray Seat**	**Party in Control of the Board**	**From**	**To**
Term expires on August 27 of years ending in 6 and 1.	Term expires on August 27 of years ending in 5 and 0.	Term expires on August 27 of years ending in 8 and 3.	Term expires on December 16 of years ending in 7 and 2.	Term expires on December 16 of years ending in 9 and 4.			
	Stephens[156]	Oviatt	Raudabaugh (r)[157]	*Devaney*	Rep	12/19/92	5/28/93
	Stephens		Raudabaugh (r)	*Devaney*	.	5/28/93	11/26/93
	Stephens			*Devaney*	Split	11/27/93	1/23/94
	Stephens		Truesdale (r)	*Devaney*	Dem	1/24/94	3/3/94
	Stephens			*Devaney*	Split	3/4/94	3/6/94
	Stephens	***William B. Gould IV***		*Devaney*	Dem	3/7/94	3/8/94
	Stephens	***Gould***	*Margaret A. Browning*	*Devaney*	Dem	3/9/94	3/17/94
Charles I. Cohen	Stephens	***Gould***	*Browning*	*Devaney*	Dem	3/18/94	12/16/94
Cohen	Stephens	***Gould***	*Browning*		Split	12/17/94	12/22/94
Cohen	Stephens	***Gould***	*Browning*	*Truesdale (r)*	Dem	12/23/94	8/27/95
Cohen		***Gould***	*Browning*	*Truesdale (r)*	Dem	8/28/95	1/3/96
Cohen		***Gould***	*Browning*		Dem	1/4/96	2/5/96
Cohen	*Sarah M. Fox (r)*	***Gould***	*Browning*		Dem	2/6/96	8/27/96
	Fox (r)	***Gould***	*Browning*		Dem	8/28/96	9/2/96
Higgins (r)	*Fox (r)*	***Gould***	*Browning*		Dem	9/3/96	2/28/97
Higgins (r)	*Fox (r)*	***Gould***			Dem	3/1/97	11/7/97

[156] Bolded signals chairman; italics signals Democrat; no italics signals Republican.

[157] Signals recess appointment.

The Smith Seat	**The Madden Seat**	**The Carmody Seat**	**The Murdock Seat**	**The Gray Seat**			
Term expires on August 27 of years ending in 6 and 1.	Term expires on August 27 of years ending in 5 and 0.	Term expires on August 27 of years ending in 8 and 3.	Term expires on December 16 of years ending in 7 and 2.	Term expires on December 16 of years ending in 9 and 4.	**Party in Control of the Board**	**From**	**To**
Higgins (r)		***Gould***		*Fox*	Dem	11/8/97	11/13/97
Peter J. Hurtgen		***Gould***	*Wilma B. Liebman*	*Fox*	Dem	11/14/97	11/16/97
Hurtgen	J. Robert Brame III	***Gould***	*Liebman*	*Fox*	Dem	11/17/97	8/27/98
Hurtgen	Brame		*Liebman*	*Fox*	Split	8/28/98	12/3/98
Hurtgen	Brame	***Truesdale (r)***	*Liebman*	*Fox*	Dem	12/4/98	11/18/99
Hurtgen	Brame	***Truesdale***	*Liebman*	*Fox*	Dem	11/19/99	12/16/99
Hurtgen	Brame	***Truesdale***	*Liebman*	*Fox (r)*	Dem	12/17/99	8/27/00
Hurtgen		***Truesdale***	*Liebman*	*Fox (r)*	Dem	8/28/00	12/15/00
Hurtgen		***Truesdale***	*Liebman*		Dem	12/16/00	12/29/00
Hurtgen		***Truesdale***	*Liebman*	*Dennis P. Walsh (r)*	Dem	12/30/00	5/14/01
Hurtgen		*Truesdale*	*Liebman*	*Walsh (r)*	Dem	5/15/01	8/27/01
		Truesdale	*Liebman*	*Walsh (r)*	Dem	8/28/01	8/30/01
Hurtgen (r)		*Truesdale*	*Liebman*	*Walsh (r)*	Dem	8/31/01	10/1/01
Hurtgen (r)			*Liebman*	*Walsh (r)*	Dem	10/2/01	12/20/01
Hurtgen (r)			*Liebman*		Split	12/21/01	1/21/02
Hurtgen (r)	Michael J. Bartlett (r)	William B. Cowen (r)	*Liebman*		Rep	1/22/02	8/1/02
	Bartlett (r)	Cowen (r)	*Liebman*		Rep	8/2/02	11/22/02
			Liebman		Dem	11/23/02	12/16/02
Liebman	Peter C. Schaumber	R. Alexander Acosta	**Robert J. Battista**	*Walsh*	Rep	12/17/02	8/21/03
Liebman	Schaumber		**Battista**	*Walsh*	Split	8/22/03	1/11/04

The Smith Seat	**The Madden Seat**	**The Carmody Seat**	**The Murdock Seat**	**The Gray Seat**			
Term expires on August 27 of years ending in 6 and 1.	Term expires on August 27 of years ending in 5 and 0.	Term expires on August 27 of years ending in 8 and 3.	Term expires on December 16 of years ending in 7 and 2.	Term expires on December 16 of years ending in 9 and 4.	**Party in Control of the Board**	**From**	**To**
Liebman	Schaumber	Ronald E. Meisburg (r)	**Battista**	*Walsh*	Rep	1/12/04	12/8/04
Liebman	Schaumber		**Battista**	*Walsh*	Split	12/9/04	12/16/04
Liebman	Schaumber		**Battista**		Rep	12/17/04	8/27/05
Liebman			**Battista**		Split	8/28/05	8/30/05
Liebman	Schaumber (r)		**Battista**		Rep	8/31/05	1/3/06
Liebman	Schaumber (r)	Peter N. Kirsanow (r)	**Battista**		Rep	1/4/06	1/16/06
Liebman	Schaumber (r)	Kirsanow (r)	**Battista**	*Walsh (r)*	Rep	1/17/06	8/2/06
Liebman	Schaumber	Kirsanow (r)	**Battista**	*Walsh (r)*	Rep	8/3/06	12/16/07
Liebman	Schaumber	Kirsanow (r)		*Walsh (r)*	Rep	12/17/07	12/31/07

Appendix B: Circuit Composition Possibilities Per Time Period

Member	Member	Member	Member	Member	Party	Dates	
	Stephens	Oviatt	Raudabaugh (r)	*Devaney*	Rep	12/19/92	5/28/93
	Stephens		Raudabaugh (r)	*Devaney*[158]	Rep.	5/28/93	11/26/93
	Stephens[159]		Truesdale (r)	*Devaney*	Dem	2/17/94	3/3/94
Charles I. Cohen	Stephens	***Gould***	*Browning*	*Devaney*	Dem	3/31/94	12/16/94
Cohen	Stephens	***Gould***	*Browning*		Split	12/17/94	12/22/94
Cohen	Stephens	***Gould***	*Browning*	*Truesdale (r)*	Dem	12/23/94	8/27/95
Cohen		***Gould***	*Browning*	*Truesdale (r)*	Dem	8/28/95	1/3/96
Cohen		***Gould***	*Browning*		Dem	1/4/96	2/5/96
Cohen	*Sarah M. Fox (r)*	***Gould***	*Browning*		Dem	2/6/96	8/27/96
Higgins (r)	*Fox (r)*	***Gould***	*Browning*		Dem	9/3/96	2/28/97
Higgins (r)	*Fox (r)*	***Gould***			Dem	3/1/97	11/7/97
Higgins (r)		***Gould***		*Fox*	Dem	11/8/97	11/13/97
Hurtgen	J. Robert Brame III	***Gould***	*Liebman*	*Fox*	Dem	11/17/97	8/27/98
Hurtgen	Brame		*Liebman*	*Fox*	Split	8/28/98	12/3/98
Hurtgen	Brame	***Truesdale***[160]	*Liebman*	*Fox*	Dem	12/4/98	12/16/99
Hurtgen	Brame	***Truesdale***	*Liebman*	*Fox (r)*	Dem	12/17/99	8/27/00
Hurtgen		***Truesdale***	*Liebman*	*Fox (r)*	Dem	8/28/00	12/15/00
Hurtgen		***Truesdale***	*Liebman*		Dem	12/16/00	12/29/00

[158] Period 11/27/1993-1/23/1994 only had two appointees.

[159] There was a one day period March 7-8 where the Board changed but no cases were heard.

[160] From 12/4/1998-11/18/1999, Truesdale was a recess appointment.

Hurtgen		***Truesdale***[161]	*Liebman*	*Dennis P. Walsh (r)*	Dem	12/30/00	8/27/01
Hurtgen (r)		*Truesdale*	*Liebman*	*Walsh (r)*	Dem	8/31/01	10/1/01
Hurtgen (r)			*Liebman*	*Walsh (r)*[162]	Dem	10/2/01	12/20/01
Hurtgen (r)	Michael J. Bartlett (r)	William B. Cowen (r)	*Liebman*		Rep	1/22/02	8/1/02
	Bartlett (r)	Cowen (r)	*Liebman*		Rep	8/2/02	11/22/02
Liebman	Peter C. Schaumber	R. Alexander Acosta	**Robert J. Battista**	*Walsh*	Rep	3/18/02	8/21/03
Liebman	Schaumber		**Battista**	*Walsh*	Split	8/22/03	1/11/04
Liebman	Schaumber	Ronald E. Meisburg (r)	**Battista**	*Walsh*	Rep	1/12/04	12/8/04
Liebman	Schaumber		**Battista**	*Walsh*	Split	12/9/04	12/16/04
Liebman	Schaumber[163]		**Battista**		Rep	12/17/04	1/3/06
Liebman	Schaumber[164] (r)	Kirsanow (r)	**Battista**	*Walsh (r)*	Rep	1/17/06	12/16/07
Liebman	Schaumber	Kirsanow (r)		*Walsh (r)*	Rep	12/17/07	12/31/07

[161] On 8/28/01. Hurtgen became chair.

[162] From 12/21/2001-1/21/2002, there was a two member Board.

[163] During part of this period, Schaumber was a recess appointment.

[164] During part of this period, Schaumber was a recess appointment.